(19,511.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 411.

THE HAMBURG AMERICAN STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

MINNIE GRUBE, AS ADMINISTRATRIX OF JOHN GRUBE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1

STATEMENT REQUIRED BY RULE 41.

The action was commenced by the issuing of a summons and by the voluntary appearance of the defendant by its attorneys, Wheeler & Cortis, on January 9, 1902.

The answer of the defendant was served on January 29, 1902.

The names of the original parties are Minnie Grube, as Administratrix of the goods, chattels and credits of John Grube, deceased, against The Hamburg American Steamship Company, otherwise known as the Hamburg-Amerikanische Packetfahrt Actien Gesellschaft. 2

No change of parties has taken place, pending suit.

The case was tried before a Court and a jury, and resulted in a verdict by the jury of $15,000, which was reduced by consent to $10,000.

There was no opinion in writing by the Court below.

3

4 N. Y. SUPREME COURT.

MINNIE GRUBE, as Administratrix, &c.,
Plaintiff,

against

HAMBURG-AMERICAN STEAMSHIP COMPANY,
Defendant.

5

Take notice that the defendant in the above entitled action appeals to the Appellate Division of the Supreme Court in and for the first Judicial Department, from the judgment in favor of the plaintiff, for Eleven thousand and forty-eight 71/100 dollars ($11,048.71), entered in the office of the Clerk of the Supreme Court, New York County, on the 30th day of December, 1903, and from the order entered on the 11th day of January, 1904, denying defendant's motion for a new trial, and from each and every part of said judgment and order.

6 New York, January 26, 1904.

WHEELER, CORTIS & HAIGHT,
Attorneys for Defendant,
21 State Street,
Borough of Manhattan,
New York.

To Messrs. LAMB, OSBORNE & PETTY,
Attorneys for Plaintiff.

THOMAS L. HAMILTON, Esq.,
County Clerk.

SUPREME COURT. 7

TRIAL DESIRED IN COUNTY OF NEW YORK.

MINNIE GRUBE, as Administratrix of the Goods, Chattels and Credits of John Grube, deceased,

Plaintiff,

against

THE HAMBURG-AMERICAN STEAMSHIP COMPANY, otherwise known as the Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, 8

Defendant.

Summons.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the 9 complaint.

Dated New York, January 7th, 1902.

LAMB, OSBORNE & PETTY,
Plaintiff's Attorneys.
Office and Post Office Address,
No. 253 Broadway,
Borough of Manhattan,
New York City.

10 SUPREME COURT,

NEW YORK COUNTY.

MINNIE GRUBE, as Administratrix of the Goods, Chattels and Credits of John Grube, deceased,
Plaintiff,

against

THE HAMBURG-AMERICAN STEAMSHIP COMPANY, otherwise known
11 as The Hamburg-Amerikanische Packetfahrt Actien Gesellschaft,
Defendant.

The complaint of the plaintiff above-named, by her attorneys, Lamb, Osborne & Petty, respectfully shows to this Court upon information and belief:

First.—That on or about August 17th, 1901, the above-named John Grube died, and thereupon the above-named Minnie Grube was duly appointed by the Surrogate of the County of Richmond, State of New York, administratrix of his goods, chattels
12 and credits, she qualified and is now acting as such.

Second.—That prior to his death said John Grube was a citizen of the State of New York and a resident of said Richmond County.

Third.—That the above named defendant was at all times herein mentioned a foreign corporation, organized and existing under the laws of the German Empire, and had an office for the transaction of business in the City and County of New York, and had property there.

That at the times herein mentioned said defend-

ant owned and controlled the SS. *Alene*, and em- 13
ployed the said steamship in carrying passengers and cargoes between the City of New York, State of New York, and ports in the West India Islands.

Fourth.—That said steamship *Alene* was at the times herein referred to flying the flag of the German Empire, and was registered or enrolled in a port located in and constituting part of said German Empire.

Fifth.—That said defendant on or about January 3rd, 1895, filed in the office of the Secretary of State of New York a statement pursuant to Section 16 of the General Corporation Law of the State of 14
New York, including a designation of certain persons upon whom process against it might be served, and received from the Secretary of State of the State of New York a certificate of authority to do business within said State, and said statement and certificate were in force at the time herein referred to.

Sixth.—That on said August 17th, 1901, said John Grube was lawfully upon and below the deck of the pilotboat *James Gordon Bennett*, a vessel owned by the United New Jersey Sandy Hook Pilots' Association, a corporation organized under the laws of the State of New Jersey, and said *James* 15
Gordon Bennett was registered and belonged in the port of New York.

Seventh.—That on or about August 17th, 1901, said vessel, *James Gordon Bennett*, with said John Grube on board, at about between two and three o'clock in the afternoon, was prudently located in the waters of the States of New York and New Jersey in the vicinity of the Scotland Lightship and of the high seas.

Eighth.—That thereupon the said steamship *Alene*, controlled by defendant, and proceeding

16 from the port of New York southward, without warning, did negligently collide with and cut in two the said vessel *James Gordon Bennett*, and did cause the said vessel *James Gordon Bennett*, and the said John Grube on board of her, to sink and drown, and thereby caused the death of said John Grube.

Ninth.—That thereby the widow of said John Grube, above named, and the next of kin, were damaged in the sum of $25,000.

Tenth.—That by the laws of the State of New York and the State of New Jersey, within whose
17 territory and waters such collision occurred and such death was caused in consequence of defendant's negligence, and by the law of the German Empire pursuant to which defendant exists a cause of action for damages resulting from negligence is given to the administrator of the goods, chattels and credits of such decedent for the benefit of the widow and next-of-kin.

Eleventh.—That the above-named Minnie Grube has requested defendant to compensate her for the death of her said husband, John Grube, as required by the laws of said States and Empire, and
18 defendant has refused to make provision and denied all liability therefor to her.

WHEREFORE plaintiff demands judgment against the defendant in the sum of $25,000 and interest from August 17th, 1901, besides the costs of this action.

LAMB, OSBORNE & PETTY,
Attorneys for Plaintiff,
253 Broadway,
Borough of Manhattan,
City of New York.

STATE OF NEW YORK,
City and County of New York, } ss.:

GILBERT D. LAMB, being duly sworn, says that he is one of the plaintiff's attorneys in the above-entitled action, and that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent is that the plaintiff is without the City and County of New York where deponent resides and has his offices, and the source of the information as to matters sworn to upon information and belief is certain documents and statements of plaintiff and others having knowledge thereof, in deponent's possession.

GILBERT D. LAMB,

Sworn to before me this
6th day of January 1902.

THOS. C. McDONALD,
Commissioner of Deeds,
City of New York.

22 NEW YORK SUPREME COURT,

NEW YORK COUNTY.

MINNIE GRUBE, as Administratrix of the goods, chattels and credits of John Grube, deceased,

Plaintiff,

against

HAMBURG-AMERICAN PACKET COMPANY,

23 Defendant.

The answer of the defendant herein, by Wheeler & Cortis, its attorneys, upon information and belief:

First.—Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in the first paragraph thereof.

Second.—Denies any knowledge or information sufficient to form a belief as to the allegations contained in the second paragraph thereof.

24

Third.—Denies the allegations contained in the seventh paragraph thereof.

Fourth.—Denies that the said *Alene* without warning, did negligently collide with and cut into said vessel *James Gordon Bennett*, as alleged in the eighth paragraph thereof, admits that the said *Alene* caused the *James Gordon Bennett* to sink, and denies any knowledge or information sufficient to form a belief as to any of the remaining allegations contained in said eighth paragraph.

Fifth.—Denies any knowledge or information

sufficient to form a belief as to the allegations contained in the ninth paragraph thereof. 25

Sixth.—Denies that said collision and death occurred within the territory and waters of the State of New York and the State of New Jersey, as alleged in the tenth paragraph thereof, but avers and alleges that said collision occurred at a point outside the territory and waters of the States of New York and New Jersey, to wit, upon the high seas.

Seventh.—Further answering the complaint herein, and as a separate and distinct defense thereto, defendant alleges that at the time of said 26
collision the said *James Gordon Bennett* with all plain sails set, and with her helm lashed, without any lookout, and with no person at the wheel, was sailing aimlessly about on the high seas, directly in the path of vessels entering and leaving the port of New York, and was so carelessly and negligently navigated that the collision complained of could not be avoided by the use of ordinary care on the part of those having charge of the steamship *Alene*, which vessel was navigated with reference to the movements of said *James Gordon Bennett*, on the supposition that said *James Gordon Bennett* was under the control of a competent wheelman and with the ordinary lookouts properly stationed 27
and attending to their duties.

WHEREFORE, defendant prays that the complaint herein may be dismissed with costs.

WHEELER & CORTIS,
Attorneys for Defendant,
21 State Street,
New York, N. Y.

County of New York, ss.:

EMIL L. BOAS, being duly sworn, deposes and says: I am the agent in the port of New York of the defendant herein. I have read the foregoing

28 answer and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

The reason this verification is not made by defendant is that it is a foreign corporation and incapable of making the same.

The sources of my information and the grounds of my belief respecting the allegations of said answer are my familiarity with such matters as agent as aforesaid, and statements made to me by members of the crew of the Steamship *Alene*.

29 EMIL L. BOAS.

Sworn to before me this 29th day of January, 1902.

HARRY M. HEWITT,
Notary Public,
N. Y. Co.

SUPREME COURT,

TRIAL TERM—PART III.

30 March 24th, 1904.

MINNIE GRUBE, as Administratrix, &c.,

against

THE HAMBURG-AMERICAN PACKET COMPANY.

Present—Hon. JAMES A. O'GORMAN, Justice.

I hereby certify that this cause was this Decem-

ber 21, 22, 23 and 24, 1903, tried by the Court 31
and a jury, and a verdict rendered therein for the plaintiff for the sum of $15,000.00/100. Upon consent of counsel, verdict reduced to $10,000.00/100, 5% allowance. Motions to set aside verdict and for new trial denied. 30 days stay, of execution after notice of entry of judgment. 30 days to make a case.

THOMAS L. HAMILTON,
Clerk.

SUPREME COURT, 32

NEW YORK COUNTY.

MINNIE GRUBE, as Administratrix of the Goods, Chattels and Credits of John Grube, deceased,
Plaintiff,

vs.

THE HAMBURG-AMERICAN STEAMSHIP COMPANY, otherwise known as the Hamburg Amerikanische Actien Gesellschaft,
Defendant. 33

The above-entitled action having been duly tried before Mr. Justice James A. O'Gorman and a jury at Trial Term, Part 3 of the Supreme Court, on the 21st, 22nd, 23rd, and 24th days of December, 1903, and the jury having rendered a verdict for the plaintiff for the sum of $15,000.00/100, and defendant having moved to set aside verdict as excessive,

34 and the plaintiff having consented that the verdict be reduced to $10,000.00/100, and the costs having been duly taxed at the sum of $1,048.71/100.

Now, on motion of Lamb, Osborne & Petty, attorneys for plaintiff, it is

ADJUDGED that the plaintiff, Minnie Grube, as Administratrix of John Grube, recover of the defendant, The Hamburg-American Steamship Company, otherwise known as The Hamburg Amerikanische Packetfahrt Actien Gesellschaft, the total sum of Eleven thousand and forty-eight and 71/100 dollars ($11,048.71/100), and have execution therefor.

December 30th, 1903.

35

THOS. L. HAMILTON,
Clerk.

At a Trial Term of the Supreme Court held in and for the County of New York, at the County Court House in the County of New York, on the 24th day of December, 1903.

Present—Hon. JAMES A. O'GORMAN,
Justice.

36

MINNIE GRUBE, as Admx., &c.,
Plaintiff,

against

HAMBURG-AMERICAN STEAMSHIP COMPANY,
Defendant.

The issues of fact in this case having been tried

at the present Trial Term of this Court, and the jury having returned a verdict for the plaintiff for Fifteen thousand dollars, and the defendant having moved thereupon to set aside the verdict, and grant a new trial, upon exceptions, and because the verdict is for excessive damages, and otherwise contrary to the evidence and contrary to law, and Mr. Wheeler having been heard for the motion, and Mr. Palmer opposed, and the plaintiff consenting in open Court to reduce the verdict to Ten thousand dollars, it is 37

ORDERED that the said motion for a new trial be and the same hereby is denied.

J. A. O'G., 38
J. S. C.

SUPREME COURT.

MINNIE GRUBE, Administratrix of John Grube, deceased, Respondent, *against* THE HAMBURG-AMERICAN PACKET COMPANY, Appellant.	Case and Exceptions. 39

Case containing exceptions, made to review by appeal the judgment herein and the order denying a new trial, and for a new trial.

The issues in this case came on to be tried before Mr. Justice O'Gorman and a jury, on the 21st day of December, 1903, and continued on trial until the 24th day of the same month.

Mr. Arthur C. Palmer and Mr. Gilbert D. Lamb appeared for the plaintiff, and Mr. Everett P. Wheeler for the defendant.

40 The plaintiff put in evidence the chart which had been put in evidence in the previous trials, referred to in the stipulation hereinafter mentioned, and which on such trials had been marked Exhibit A. This mark was retained. A copy of the chart is annexed to this case. This stipulation, so far as material, is as follows:

That the point marked *Alene* and Wreckage, and initials A R M, indicated by the witnesses for the plaintiff as the point of collision between the *Alene* and the *James Gordon Bennett*, is less than three nautical miles from the New Jersey shore, and inside the harbor line; that the red buoy marked Wreck, mentioned in the order of the Light House
41 Board as indicating the wreck of the *James Gordon Bennett*, and the point marked V, and initials J. R., indicated by Captain Johannes Rohde as the point of collision, are both outside the harbor line, and more than three and less than twelve nautical miles from the nearest shore.

It is understood that the stipulation as to the chart in evidence does not include admission that the easternmost course of the boundary lines between the States of New York and New Jersey is correctly drawn thereon, defendant claiming that this extends only to the main sea and not further than a point northeast of the Hook Beacon.

The plaintiff then put in evidence Letters of Ad-
42 ministration which were alleged in the complaint and by which plaintiff was appointed administratrix of the estate of John Grube, deceased.

The plaintiff then put in evidence the Statute of the State of New Jersey, passed March 3rd, 1848, which is as follows:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an

action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." 43

The plaintiff then put in evidence Articles 20 and 21 of the Rules to Prevent Collisions at Sea and upon Inland Waters, adopted by the Congress of the United States by the Act approved June 7, 1897:

Article 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Article 21. When, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed. 44

NOTE.— *When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avoid collision* (*See Articles twenty-seven and twenty-nine*). (*Act of May 28, 1894.*)

The defendant in connection therewith put in evidence Articles 23, 27 and 29 of the same rules:

Article 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse. 45

Article 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation or collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Article 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practices of seamen, or by the special circumstances of the case.

46 The plaintiff then read in evidence Section 2 of the Act of Congress, approved February 19, 1895, being at page 672, of Vol. 28, of the U. S. Statutes at Large, authorizing the Secretary of the Treasury to designate certain lines within which the Inland Rules of Navigation shall be in force.

The plaintiff then read in evidence a stipulation as to the dimensions of and ballast on the *Bennett:*

It is stipulated and admitted that the description and dimensions of the pilot schooner *James Gordon Bennett*, lost on the 17th day of August, 1901, in collision with the Steamship *Alene*, were as follows:

She was a schooner built of wood, having one deck, two masts, a plain head and an elliptic stern.

47
Length over all.....85-5 feet
Length on water line.....78 "
Breadth.....20-9 "
Depth.....9-4 "
Draught of water.....10 " 6 inches
Gross tonnage.....74 69/100 tons
Net tonnage.....70 96/100 "

New York, October 24, 1902.

It is stipulated that the statement of Messrs. C. & R. Poillon of the weight and description of ballast, anchor chain and anchors placed by them on the pilot boat *James Gordon Bennett* be received in evidence with the same force and effect as if a member of that firm had attended on the trial and testified thereto.

48

Copy

C. & R. Poillon
Office, 224 South Street,
New York.

New York, Oct. 28, 1902.

Messrs. Wheeler, Cortis & Haight,
21 State St, City.,

Gentlemen—Our books show that we furnished Pilot Boat *David T. Leahy* (afterwards *James Gordon Bennett*) 37,335 lbs. cast iron ballast and 40,745 lbs. kentledge (78,080 lbs. in all) and 2 anchors weighing respectively 620 and 724 lbs.

Yours truly,
(Signed) C. & R. Poillon.

The plaintiff then called EDWARD J. REARDON, who testified as follows: 49

I am apprenticed to the New Jersey and Sandy Hook Pilots' Association, to which the pilot schooner *James Gordon Bennett* belonged. I have been in its employ seven and a half years. I remember the day of the collision between the *Alene* and the *Bennett*, August 17, 1901. It was a fine clear day. There was a light breeze from the southward. The tide was ebb. The collision took place somewhere in the vicinity of the Scotland Lightship. At the time of collision the *Bennett* was on a south westerly course. She had been on that course fifteen minutes. She was a two-masted 50 schooner rigged vessel. I was boat keeper, and was on deck at the time of collision. The *Bennett* was moving, preceding the time of collision, about three or four knots. She had a double reef mainsail, whole foresail, jib and staysail. I noticed the steamship *Alene* at the bar where she was dropping her pilot, between the whistling buoy and Gedney's Channel, about halfway between the two. When I last noticed her she was heading under our stern. When she discharged her pilot she was about two miles or a mile and a half from the *Bennett*. When the *Bennett* was struck, I got hit by a sea and was picked up in the water. When I was picked up 51 I saw a pretty big piece of the *Bennett's* side broken off and floating. It was about 8 feet by 10. I also saw a floating coil of rope, foghorn, pieces of the fine work of the cabin, keelson wood, big blocks of wood, a lot of stuff around. The *Alene* struck the *Bennett* on the starboard side, just around the main rigging. At the time I noticed the *Alene* approaching, she was going about ten knots.

Q. About how long preceding this collision had you tacked to go about? A. Fifteen minutes; fifteen or twenty minutes.

52 The cross examination of the witness was directed to showing that in the time mentioned by him, during which the *Bennett* was on her westerly course, he included tne time consumed in the operation of tacking, and that after tacking, the speed of the *Bennett* was reduced from six knots, which it was while she was going to the eastward, before she tacked, to about two knots while she was on the westerly course. But inasmuch as no point is made on this in any of the exceptions hereafter noted, for the reason that the Appellate Division held on the first appeal herein that the evidence on this subject was conflicting and properly submitted to the jury, the testimony is not stated in full. He
53 also testified that the *Alene* was one of a regular line of West India steamers, and that he had often seen her before. He also testified that before the collision, the Scotland Lightship was on the *Bennett's* port bow.

On re-examination, he said that the *Bennett* never went to the south of the Scotland Lightship.

PHILIP J. CLARK was then called, and testified that he was a sailor on the *Bennett* at the time of collision; that she was then on a West South
54 West course, pointing towards Sandy Hook, and that she had been on that course at the time of collision, seven minutes; that he saw John Grube on the *Bennett* immediately preceding the collision, and that since then the latter has never been seen.

On cross examination, he said that he saw the Scotland Lightship on the *Bennett's* port bow, just before the collision. His testimony is not further stated, because in the previous decision of the Appellate Division in this case, it was held that there was evidence in the case to go to the jury of negligence on the part of the *Alene*, and the Court of Appeals has no jurisdiction to review this decis-

ion, and as John Grube was steward on the *Bennett*, and in no way responsible for her navigation, there was no evidence of negligence on his part and therefore on this appeal no exception on the question of negligence is available. 55

Plaintiff called FRANK HOPKINS, who testified among other things that John Grube was aboard the *Bennett* at the time; that he was never seen alive after the collision, though search was made for bodies; that John Grube was a very steady man, had been for 17 years in the employ of the pilots, and his compensation was $50 per month and his board and lodging, and that he was ashore about once per week to see his wife. 56

Plaintiff also read the testimony of ARTHUR B. CONNOR, given March 7, 1902, who testified that he was captain of a steam dredge that had been dredging at the entrance of the new channel, and had gotten his load and was going out to the dump, about three miles southeast of the Scotland Lightship, when he sighted the *Alene;* that she discharged her pilot at the point marked "X S. P. B." on the chart put in evidence by defendant, and marked Ex. 2. A copy of this chart is annexed to this case. 57

He also testified that he observed the *Bennett* sailing to the eastward, and that the farthest point to the eastward reached by her was that marked by him on the same chart, "X farthest *Bennett*".

The witness on being recalled, testified:

I observed the pilotboat *Bennett* possibly twenty minutes before the collision, during which time she did not change her course. She was hove to. Yes, sir. Had her foresail to the windward.

The testimony of the same witness, taken in the

58 Admiralty suit, in the U. S. District Court, April 3, 1902, as follows was put in evidence by consent:

I observed the *Bennett* from the time I left my station north of the Gedney buoy. That was surely half an hour before the accident. When I first noticed her she was heading to the eastward. She tacked ship probably at this time. I should say she was heading to the eastward when I first noticed her; she tacked ship I should say about at the time the *Alene* dropped her pilot; it was about surely 15 or 20 minutes before the collision. She held that course from the time she tacked and came in westerly until the collision.

59

On cross examination he testified (fols. 161, 162):

When I got my load on board and started for the dump I was just north of the Gedney Channel at the entrance of the new channel. It was at the point of that shoal ground marked "16" feet just north of the Gedney. And the word "hard" right under it and the word "red" printed.

I don't remember now the time I left. I do remember the time of the collision. We ran by our own power, twin screws. I was bothered a great deal in crossing the channel. I couldn't tell you about the distance or the speed we were going, I
60 was bothered so crossing the Gedney Channel. Usually deep loaded, full speed, those boats would make ten knots, but I had to stop and turn around for this English steamer.

He further testified that in his opinion the collision between the *Alene* and the *Bennett* took place a little to the eastward of the point marked "X *Alene* Wreckage, A. R. M." And his testimony tended to show that the wreckage of the *Alene*, after the collision, drifted to the eastward.

Other evidence was given by the plaintiff tending to support the charge of negligence against the *Alene*, and to show that she might and should have kept her helm hard-a-starboard and so gone under

the *Bennett's* stern, but as on this appeal no question is raised on this subject, the testimony is not stated in full. 61

The plaintiff read in evidence the testimony of THOMAS C. LENNAN, taken on the previous trial of this case. So far as it relates to the question of damages, it is as follows:

I am a Sandy Hook pilot. I am President of the Association known as the Sandy Hook Pilots, and have been President of the Association two years. That Association owned the *James Gordon Bennett*. At the time this collision happened, there was a steward, Mr. Grube, on board of her, beside sailors and pilots. I had known John Grube at least ten years. He was steward of the pilot-boat—steward in our employ, a first-class man. His wages at that time was $50 per month. His board and lodging was furnished him free. We pay at the rate of $50 per month on sail boats. We have one steamboat, and also another one under construction, on which we pay $75 a month, and Mr. Grube was on the line for promotion. He would receive the second boat as soon as she was put in commission. She will be in commission now in about seven or eight days. As far as I know he was in very good health. In two years, when I was captain of the boat, I know that he did not lose one cruise in two years. I never knew him to take a glass of liquor in my life. John Grube was not a pilot. He was an employe of the Pilots' Association. 62 63

He further testified that after the collision the pilots had a steam pilotboat and a sail boat cruising around in the vicinity of the supposed place of collision looking for bodies; that they also advertised and offered a reward, but the body of John Grube was never found or heard of.

64 **The plaintiff called EBEN TURNURE, who testified as follows:**

I am a Sandy Hook pilot, and have been such for 22 years. I belong to the New York Association. On the day of the collision between the *Bennett* and the *Alene*, I was aboard of the steam pilotboat *New York*. She was just outside of Gedney's Channel, taking pilots out of outward bound vessels. She was located there at the same place, practically, just moved backwards and forwards. Immediately preceding the time my attention was called to the collision between the *Alene* and the *Bennett*, she was about half-way between the
65 whistling buoy and the Gedney Channel. By the entrance to Gedney Channel I mean what has been called the electric buoy. It is the entrance buoy. My attention was called to the fact of the collision when the pilot from the *Falls of Keltie* came aboard and told us a collision had occurred.

Q. What did you then observe? A. Well, as soon as we got clear of the *Falls of Keltie* we took him out and hoisted our yawl and we went right down under her stern and went down towards the wreckage, and we saw two steamers there—we saw the *Alene* and the *Morro Castle*, and we saw the wreckage floating around there. There was a
66 couple of boats in the water. At that moment the *Morro Castle* was about on a line from us to the Scotland Lightship. She was in a range from us about a mile or a mile and a quarter north of the Scotland Lightship. The *Alene* was close to that position, just north of the *Morro Castle*. These two boats were almost in range with the Lightship.

Q. What, if anything, did you observe in the way of wreckage in the vicinity? A. There was a lot of wreckage. I saw the coamings of the hatches and covers of the hatch, and some floating wood, and I saw a code of signals, and I saw what we call firewood used for the kitchen stove, and different things from the boat; pieces of the deck.

After my attention was first called to that collision, we went down in the vicinity of the wreckage as fast as the boat could steam. The distance was only short. I should judge we got there within five minutes. The distance was only from half to three-quarters of a mile, to where the *New York* fell in with the wreckage and the *Alene*. Some of the wreckage was within a few feet of the *Alene*, and some was a hundred or two hundred feet. It was scattered by the time we got there. When we got to the *Alene* there was two boats alongside of her, one of her own, and the *Morro Castle's* life boat was there. She was lying still in the water. The wreckage was drifting out with the ebb tide, towards the southeast, I should say. I did not see the *Alene* move at all from the time my attention was first called to the accident. 67 68

Q. Now, as a matter of fact, did you notice on the following day or the day after, the place where a buoy was placed along what was supposed to be the wreck of the *James Gordon Bennett?* A. Yes, sir.

Q. Now, are you able to state to this jury where that position was with respect to where you saw the wreckage the day before; I mean the direction?

To this question the defendant objected, on the ground that the time when the witness saw the wreckage was so long after the collision that it affords no guide. It is undisputed that the *Alene* was in motion at the time of the accident. How fast she was going may be a question, but she certainly was in motion; and certainly also there was a time when the wreckage was drifting and floating on the surface of the water, and this witness does not know just how long after the accident he got to the scene of it. He did not see it himself. He was told by the 69

70 pilot of the *Falls of Keltie* that there was an accident, and he went down in his vessel and gets there ; and he is now asked, after that indefinite examination, to form a judgment as to what he saw placed the next day.

Mr. Palmer.—I submit that the form in which the objection is put is a matter of argument as to what it establishes. We have got the tide setting one way and we have got the wind described and stated to be in one direction. It is a matter of argument as to where the actual point of impact occurred ; and consequently it is not
71 an objection to the evidence, because it would be in the way of argument as——

The Court.—This witness has been permitted to state all that I apprehend he is capable of stating of his own knowledge with respect to the presence of the wreckage, and he has told you without objection that at the time he saw it the wreckage was north of the three-mile line.

Mr. Wheeler.—North of the lightship.

The Court.—North of the lightship and that the ebb tide was carrying it out, and was in a southeasterly direction; but, al-
72 though it had been carried some distance out, still it was inside and north of the lightship.

Mr. Palmer.—He can state further as to where they put the buoy to indicate the wreck as at present lying at the bottom of the sea. The contention here is that the point of impact occurred at the point where the buoy now marks the wreckage. We propose to show by an expert that when he saw that wreckage floating around the steamer that had caused her condition, that it was far removed from where that buoy is indicated.

The Court.—I shall allow the witness to answer the question. 73

To this ruling the defendant excepted.

Q. (By the Court).—Trusting to your own recollection and your own personal observation when you saw the wreckage on the day before, was it further north, south, east or west of the buoy that marks now officially the wreck? A. It is at least three-quarters of a mile northwest of where the buoy was placed.

By Mr. Palmer:

Q. You were conversant during all the time the buoy marked that wreck, where the *Bennett* had gone to the bottom? A. Yes, sir. 74

Q. And the point where you say you saw the floating débris in the locality where the *Alene* was laid to was three-quarters of a mile from that point? A. About that.

Q. (*By the Court.*) Northwest? A. North. west, about.

Q. (*By the Court.*) Gradually drifting out to sea? A. Yes, sir; on the ebb tide.

This buoy which marked the wreck was put near the point of the mast. I saw that. It was the heel of the mast. That is the part of the mast that 75 is stepped in the keelson, that goes down through the deck. The vessel had sunk and the mast had come up, because the vessel had gone to pieces and the wreck held the head of the mast down.

Q. When you say the vessel had gone to pieces ——A. (Interrupting.) I mean to allow the mast to come up. I saw it the next day when the lighthouse people put the buoy there. That was the morning of the day after the accident.

I took a bearing from the deck of the steam pilot boat *New York* just before I got to the wreckage. I could take that bearing from the lightship and

76 from the Highlands. I saw the Highlands open to the westward of the Scotland Light Ship.

Defendant conceded that the harbor line from Scotland Light Ship to the Whistling Buoy is practically the three mile limit.

The plaintiff then read the deposition of JAMES ROSS CURTIS, taken out of Court. He, having been duly sworn, testified as follows:

My name is James Ross Curtis, and I am a mariner, having been such for fourteen years, and
77 being at present chief officer of the *Morro Castle*. I occupied that position on the 17th day of August last. The *Morro Castle* belongs to the Cuban and American Mail Steamship Company, commonly called the Ward Line. Her tonnage is 6,400 gross. I have been her first officer for seven years. She sails from New York to Havana, and I enter and leave the harbor of New York twice a month, and am thoroughly familiar with all landmarks of the harbor. I can locate the position of the *Morro Castle* at half past two o'clock in the afternoon of the 17th of last August. At that time she was just about the entrance of Gedney's Channel, just about
78 at the first electric buoy, not the whistling buoy, but about where you discharge the pilot, just outside the electric buoy. I have the correct time here in my log book, and that was about the hour. About that time the sailors called my attention to a steamer running into a sailing vessel. I did not see the accident myself. One of the vessels was the *Alene*, a steamer of the Atlas Line, and the other was the pilot boat Number 7, *James Gordon Bennett*. I saw the steamer there apparently stop, or backing, or something. She was stopped and had wreckage all around her bow, wreckage, spars, &c. At the time I first looked she was about over half-way—the entrance of Gedney's Channel, where you discharge the pilot—the first electric buoy.

Q. That is half-way between the Scotland Light- 79
ship and your position? A. Yes, sir, I judge about half-way between the buoy and Gedney's Channel. The *Alene* and the wreckage were between us and the Scotland Lightship. I am familiar with the imaginary line running from Navesink Highlands to the Scotland Lightship and thence to the whistling buoy, then to the Rockaway Beach Life Saving Station. At the time I put that body into the boat of the *Alene*, the *Alene* boat, I was looking for my bearings at that time, and I thought she was just inside the Scotland Lightship, and the *Morro* was just inside. I am familiar with the Government chart of the Harbor of New York. 80
That is the chart, yes, sir.

The chart of New York Bay and Harbor, which was shown the witness on his cross examination, was the same as that already put in evidence and marked Exhibit A, except that the marks had not then been placed upon it.

Certain lines indicating the boundaries between the States of New York and New Jersey and the harbor line running from Navesink Highlands to the Scotland Lightship, and thence from the whistling buoy to the Rockaway Beach Life Saving Station, were 81
upon the chart at the time the same were offered in evidence, placed there by the attorneys for the plaintiff.

The witness indicated by mark (initialed by the Referee) and the name *Morro Castle*, the position of that vessel at the time in question.

Q. Now, Mr. Curtis, can you indicate on that chart the position of the *Alene* and the wreckage at the time you first noticed it?

To this question the defendant objected that from the portion of the deposition al-

82 ready read, it appears that Mr. Curtis took no bearings and made no observation of the positions of the vessels, or either of them, either of the *Alene* or of the *Bennett;* that he says himself he did not see the collision, and that upon cross examination in the same deposition, hereinafter printed (which was at the same time showed to the Court), he says expressly:

There was no particular reason why I should have taken my bearings accurately from the boat. I have not given any bearings. I noticed where I got the body aboard; I noticed where I was. I
83 looked around to see where I was; I saw the pilot-boat and the *Alene* where that was. I have not given any bearings. I have just given my opinion of the position where I was just in a general way from my memory of the situation.

The Court overruled the objection, and defendant excepted. The witness indicated upon the chart the position of the *Alene* and the wreckage at the time he first noticed it, and at that point the Referee writes the name *Alene* and "Wreckage", and initials it.

A. At the time I picked up the body of the man
84 from the *James Gordon Bennett*, I would change the position just a little bit to the southward of that. This is all approximate, of course; I had no bearings or anything else.

The plaintiff then put in evidence a stipulation from the official tide tables of the Atlantic Coast of the United States, published by the United States Government, for 1901, tide tables for Swash, Main, and Gedney Channels:

The direction of the tide at one hour before low water is North 82° East, the ve-

locity 1 7/10 knots per hour. At low water it is the same direction, with a velocity of one knot. At one hour after low water it is South 82° West, and at the rate of 1/10 knot per hour; two hours after low water it is South 82° West, and at the rate of 1 1/10 knots per hour. The time of low water was 3:44 P. M., and the slack before the flood, when there was practically no current at all, was at 4:23 P. M. 85

The plaintiff then called WILLIAM S. MCLAUGHLIN, who testified as follows:

I am and have been for four years a Sandy Hook pilot. As such I have had occasion to be down the bay in the vicinity of Scotland Lightship, frequently. I am familiar with the location of lightships, buoys and the different channels there. I remember the day of the collision between the *Bennett* and the *Alene*. My attention was first called to them around half-past two. I was just aboard the *Morro Castle*. She was coming out of Gedney's channel. The *Bennett* was going to the westward. Her bow was towards the Jersey coast. Immediately after I left the *Morro Castle*, I went in a yawl and into the steamship station boat *New York*. I did not notice the *Alene* then. I had noticed her while I was on the *Morro Castle*. The *Alene* was stopped outside the Gedney's channel discharging her pilot. After I got aboard the *New York*, I stopped around the deck a few moments and went below. I wasn't below more than ten minutes. I then came up on deck. I then saw the *Morro Castle* and the *Alene* apparently stopped. At that time the *New York* was between the outer buoy at Gedney's and the whistling buoy. The *New York* was then closer to the Gedney's buoy than the whistling buoy. 86 87

The witness indicated on the chart as the place where the *New York* was when he came up from below, the place marked "M".

88 I then noticed the Scotland Lightship and where the *Alene* was located.

Q. Where was that with respect to a line running from the *New York* to the Scotland Lightship?

To this question defendant objected, on the ground that the period was too long after the collision to afford a guide for the jury to determine in any way the place of collision, that the vessels had moved about meanwhile, and that, therefore, an observation of the then position of the *Alene* was immaterial.

Objection was overruled, and defend-
89 ant excepted.

A. It was about on a line between the *New York* and the Scotland lightship. The *Alene* was then pointed to the southward. Immediately after our observing the *Alene* at that point, we took a man out of a steamer, and after we picked the yawl up, we went down to the scene of the wreck. We got there about twenty minutes after I first observed her. When we got to the *Alene*, I should judge she was about a mile or a little less to the north of the Scotland Lightship. The wreckage I saw was the foghorn of the *Bennett*, the binnacle box, a part of the deck, some mat-
90 tresses and pieces of a hatch, and a great many other things I don't just recall now. The wreckage was drifting out with the ebb tide. The wind was to the southward and westerly. I observed the tide running by Gedney's buoy as I was coming out.

Cross examined:

Q. I had often been on the *Bennett*. The mattresses that after the wreck I found floating about on the water were stored in the berths, three on each side, from the mainmast to the after part of the companionway. In order for the mattresses to come up from there and float up, there must have

been openings in the deck sufficient to allow them through. I saw the hatch of the aft companionway floating in the water. Probably the force of the water drove it out. 91

When I noticed the *Bennett* from the *Morro Castle* I was possibly half a mile from the place where I went aboard the steam pilotboat. I noticed her just as we were going over the bar. The bar is at the easterly entrance. I went into the steam pilotboat from the *Morro Castle*, about half a mile to the east of the easterly entrance of the Gedney Channel. When I noticed the *Bennett* first I was on the bridge of the *Morro Castle*. The *Bennett* was then to the westward of a line drawn from the outer buoy at Gedney's to the Scotland Lightship. She was bearing from me south half east. From the time I saw the *Bennett* until I got aboard the steam pilotboat was probably four or five minutes. I had to get down the side of the *Morro Castle* into the yawl, and be pulled a couple of hundred feet. Then I went up the side of the *New York*. When I went below, I drank a cup of coffee. That is all I had downstairs, then I came up. As soon as I came up in the doorway, I saw the ships apparently stopped. When I got down to the *Alene* and saw this wreckage floating about, part of it was a piece of the deck. That was nine or ten feet by six. I should judge it would be part of the quarter-deck aft of the mainmast. The wind at that time was from South and West. The best explanation I can give of the wreckage being scattered, is that the screw of the steamer going through the wreckage would scatter it. 92 93

Re-direct examination:

A. Did you observe where the Government placed the buoy over what was supposed to be the *James Gordon Bennett*? A. Yes, sir.

Q. Are you able to tell this jury where that was,

94 relative to the place where you located the wreckage on the day of the accident?

To this question defendant objected on the ground that the observation was too remote from the period of collision; that the witness himself did not see the collision, that he has given us the location of the wreckage, and any further statement by him is an opinion.

The objection was overruled, and defendant excepted.

95 *The Court.*—Was it north or south of that point?

A. To the eastward.

Q. About how far to the eastward?

To this question the defendant made the same objection.

The objection was overruled, and defendant excepted.

A. I should judge about three-quarters of a mile.

96 ———

The plaintiff called MINNIE GRUBE, who was sworn and testified as follows:

I was the wife of John Grube. He was 45 years old. He had fifty dollars a month, and his board and lodging. He gave me all his money every month. Fifty dollars he handed me every month. He had been doing that the last twelve years, as long as he was on a pilot boat. Mr. Grube left me no property. He was a very industrious and ambitious man, a good man, and he provided well for me. He was never sick a day in his life. He was in perfect health.

I have had three children; none of them are living. 97
I am thirty-five years old. I saw my husband for the last time on Monday before the accident, and have never heard from him since then.

Cross examination:

Q. How did your husband get his clothes? A. My husband has got a good deal given from the pilots. The pilots were very good to my husband in that regard. If he bought a suit of clothes a year that was all.

Q. But he must have had underwear, socks and all that. You don't mean to say that he never spent any money for clothing? A. The pilots 98
were very good to my husband. Whatever he did spend for his clothes was very little, that it doesn't amount to a great deal. He spent very little for clothes. My husband was a man who took very good care of things. He spent very little, but I can't remember how much. It was very little.

The plaintiff then put in evidence from the Northampton tables, that the decedent had an expectation of life, at forty-five, of 20 and 52/100 years.

Plaintiff also introduced stipulation as to testimony of HENRY KNICKMAN, a sailor on board the *Bennett* at the time of the collision, tending to 99
show that immediately before the collision said John Grube was below deck in performance of his duties as cook, and that he was last observed by said Knickman in the galley under the hatch between the fore and mainmast.

The defendant introduced evidence tending to show that the diagram, Ex. 9, annexed hereto, which was put in evidence by it, showed correctly the relative courses of the *Bennett* and the *Alene*, but for the reason before stated, this evidence is not stated in full. And upon cross examination of the witness testifying to such evidence, testi-

100 mony was adduced by plaintiff tending to show that the diagram was made up from data furnished him by defendant's counsel.

It was proved that the morning after the collision the foremast of the *Bennett* was nearly vertical in the water, heel upward, and held by part of the forerigging a wire rope attached to the wreck; that this wreck was buoyed by the Light House Board of the United States Government, and was located in the position shown on said chart, Ex. 2, by the symbol of a buoy and the word Wreck. This was the point at which the defendant claimed the collision took place. For the reason aforesaid, this

101 evidence is not stated in full.

The notice of such location given by the Light House Board was put in evidence, and is as follows:

LIGHT HOUSE ESTABLISHMENT,

General Depot,

Office of Inspector for Third District.

TOMPKINSVILLE, N. Y., August 19, 1901.

Local Notice to Mariners:

New York off Entrance to Bay
Wreck Buoy Placed.

Notice is hereby given that a first-class spar buoy,

102 painted in black and red horizontal stripes has been established in 10 fathoms at mean low water to mark the wreck of the pilot boat *James Gordon Bennett*, sunk off the entrance to New York on the following magnetic bearings:

Sandy Hook light Vessel E 1/8 N.

Whistling Buoy at entrance Gedney Channel, N 7/16 E.

Scotland light Vessel, S. W. 1/2 W

Sandy Hook (rear) light House W. 3/4 N.

This buoy is about one hundred feet S. E from the wreck; one mast and heel of topmast are floating attached to rigging.

By order of Light House Board.

(Signed) WM. M. FOLGER,
Captain, U. S. N. Inspector.

The defendant then put in evidence the Statute of the State of New Jersey, passed March 12, 1846, page 124 of the New Jersey Laws of that year, ceding the Sandy Hook Peninsula to the United States. This Act is as follows: 103

LAWS OF NEW JERSEY 1846, PAGE 124.

An Act to vest in the United States of America jurisdiction over Sandy Hook.

1. BE IT ENACTED by the Senate and General Assembly of the State of New Jersey, That the jurisdiction in and over all that portion of Sandy Hook, in the county of Monmouth, owned by the United States, lying north of an east and west line through the mouth of Youngs creek at low water, and extending across the island or cape of Sandy Hook from shore to shore, and bounded on all other sides by the sea and Sandy Hook bay, be, and the same is hereby ceded to the said United States, for military purposes; and the said United States shall retain such jurisdiction so long as the said tract shall be applied to the military or public purposes of said United States, and no longer. 104

2. And be it enacted, That the jurisdiction ceded in the first section of this act, shall not prevent the execution on the said tract of land of any process, civil or criminal, under the authority of this State, except so far forth as such process may affect any of the real or personal property of the United States of America within the said tract; nor shall it prevent the operation of the public laws of this state within the bounds of the said tract, so far as the same may not be incompatible with the free use and enjoyment of the said premises by the United States for the purposes above specified. 105

3. And be it enacted, That all the lands and tenements within the aforesaid boundaries, so long as the same shall continue the property of the United States, and to be used for the purposes expressed in this act, shall be and remain exempted from all taxes, assessments, and other charges which may be imposed under the authority of this state.

4. And be it enacted, That this act shall take effect immediately.

Approved, March 1846.

106 The defendant then put in evidence the Act of Congress of the United States, passed March 26, 1804, contained in Vol. 2 of the U. S. Statutes at Large, page 294.

Defendant then put in evidence a deed from Richard Hartshorne and others to the United States, dated February 26, 1806, conveying the northern part of the Sandy Hook Peninsula.

This deed is as follows :

RICHARD HARTSHORNE and SUSANNA, his Wife, Tylee Williams and Elizabeth, his Wife,
107 and Nimrod Woodward and Ann, his Wife

to

THE UNITED STATES OF AMERICA.

Deed Indented. This Indenture made the twenty-sixth day of February, in the year of our Lord eighteen hundred and six, between Richard Hartshorne and Susannah, his wife, Tylee Williams and Elizabeth, his wife, and Nimrod Woodward and
108 Ann, his wife, all of the County of Monmouth and State of New Jersey, parties of the first part.

And the United States of America, parties of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of Three thousand seven hundred and fifty dollars, to them paid by the said United States of America immediately before the ensealing and delivery of the se presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, aliened, enfeoffed, conveyed and confirmed, and by these presents do freely and absolutely grant, bargain and sell, alien, enfeoff, convey and confirm

unto the said United States of America and their assigns,

All that certain tract or lot of land, being part of a certain tract of land called Sandy Hook, in the said County of Monmouth, bounded and described as follows, that is to say: All that part of the point of land in the said County of Monmouth, lying on the north side of a line drawn east and west through the present light house on Sandy Hook.

Together with all houses, outhouses, buildings, woods ways waters water courses easements profits advantages privileges emoluments and hereditaments whatsoever to the said Lot or tract of Land belonging or in any wise appertaining or which to and with the same have been held and occupied reputed taken or known as part parcel or member thereof And the reversion and reversions remainder and remainders thereof and every part and parcel thereof with the appurtenances.

And also all the estate right title interest property claim and demand whatsoever in law or equity of them the said parties of the first part or any or either of them of in and to all and singular the premises above mentioned and of and to every part and parcel thereof with the appurtenances.

To have and to hold the said Lot or Tract of Land hereditaments and premises above granted and conveyed and every part and parcel thereof with the appurtenances unto the said United States of America and their assigns to the only proper use and behoof of the said United States of America and their assigns forever.

And the said Richard Hartshorne Tylee Williams and Nimrod Woodward for themselves their heirs executors and administrators Do hereby covenant and agree to and with the said United States of America and their assigns that the said United States of America and their Assigns shall and may at all times hereafter quietly and peaceably have hold occupy use and enjoy the said Tract of Land and premises hereby granted and conveyed and

every part thereof with the appurtenances without any suit trouble, eviction or disturbance whatever of by or from the said Richard Hartshorne Tylee Williams and Nimrod Woodward, or either of them or of by or from any person or persons lawfully claiming or to claim the same or any right interest or estate therein.

And Also that they the said Richard Hartshorne Tylee Williams and Nimrod Woodward, their heirs executors and administrators shall and will Warrant and by these presents forever defend the said tract of Land and premises hereby granted and conveyed and every part and parcel thereof, with the appurtenances unto the said United States of America and their assigns against them the said Richard Hartshorne Tylee Williams and Nimrod Woodward and their heirs and against all and every other person whomsoever lawfully claiming or to claim the same.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

RICHD HARTSHORNE [L. S.]
SUSANNA HARTSHORNE [L. S.]
TYLEE WILLIAMS [L. S.]
ELIZABETH WILLIAMS [L. S.]
ANN WOODWARD [L. S.]

Signed, Sealed and Delivered in the presence of

WILLM. HARTSHORNE
WILLIAM LALTAR

The deed was duly acknowledged February 26, 1806, and was recorded in the office of the Clerk of Monmouth County, April 28, 1807.

Defendant then put in evidence the deed of Richard Hartshorne and wife to the United States, dated June 17, 1817, conveying the balance of the

Sandy Hook Peninsular to the south of the land described in the first deed ; the two deeds together conveying the whole of the Sandy Hook Peninsula north of the boundary line described in the Statutes of New Jersey, hereinbefore stated. 115

RICHARD HARTSHORNE AND SUSANNA, his Wife,

to

THE UNITED STATES OF AMERICA.

116

Deed Indented. This Indenture made the seventeenth day of June in the year of our Lord one thousand eight hundred and seventeen.

Between Richard Hartshorne of the Township of Middletown in the County of Monmouth and State of New Jersey and Susannah his wife of the first part,

And the United States of America of the second part,

Whereas the proprietors of East Jersey by certain letters patent under the Seal of their said province bearing date the second day of November in the year of our Lord one thousand six hundred and ninety-two did grant, release and confirm 117 unto Richard Hartshorne now deceased and his heirs certain lands and among others all that tract piece or parcel of land hereinafter described and conveyed and Whereas by a certain deed poll, bearing date the tenth day of May in the year of our Lord one thousand seven hundred and six the said Richard Hartshorne the said patentee, did grant, bargain and sell the said lands hereinafter described to his son, William Hartshorne and his heirs and Whereas the said William Hartshorne being seized and possessed of the said lands did make and publish his last will in due form of law

for passing real estate and did thereby authorize his executors to sell all his real estate and did appoint Thomas Hartshorne, Hugh Hartshorne and Robert Hartshorne, executors of the said last Will Testament and did afterwards die seized and possessed as aforesaid and whereas by a certain Deed Indented bearing date the eighteenth day of April in the year of our Lord one thousand seven hundred and forty-nine the said Thomas Hartshorne, Hugh Hartshorne and Robert Hartshorne executors as aforesaid granted, bargained and sold the lands hereinafter described to John Hartshorne and his heirs and whereas by a certain deed indented bearing date the tenth day of July in the year of our Lord 1749 the said John Hartshorne did grant, bargain and sell the said lands hereinafter described to Hugh Hartshorne, Robert Hartshorne and Esek Hartshorne and their heirs as tenants in Common. And whereas by a certain deed indented bearing date the seventeenth day of January in the year of our Lord one thousand seven hundred and fifty-four the said Hugh Hartshorne did grant, bargain and sell all his right, title and interest in and to the lands hereinafter described to the said Robert Hartshorne and Esek Hartshorne and their heirs as tenants in common. And whereas by a certain deed indented bearing date the thirty-first day of December, in the year of our Lord one thousand seven hundred and ninety-nine the said Robert Hartshorne did grant, bargain and sell all his right, title, interest and estate in the said lands hereinafter described to the said Richard Hartshorne party hereto of the first part and his heirs and whereas the said Esek Hartshorne being seized and possessed of one undivided moiety of the said lands and hereafter described made and published in his last will and testament in due form of law for passing real estate and thereby authorized his executors to sell his real estate and afterwards died seized and possessed as aforesaid. And whereas the Executors of the said

Esek Hartshorne in pursuance of the authority granted them by the said will did by a certain deed grant, bargain and sell the said undivided moiety of the lands hereinafter described to Tylee Williams and Nimrod Woodward and their heirs and whereas by a certain deed indented bearing date the twenty fifth day of May in the year of our Lord one thousand eight hundred and seven the said Tylee Williams and Elizabeth his wife and the said Nimrod Woodward and Ann his wife did grant, bargain and sell all their undivided parts or shares of the said land hereinafter described to the said Richard Hartshorne party hereto of the first part and his heirs. 121 122

Now this indenture witnesseth that in consideration of the sum of twenty thousand dollars lawful money of the United States at and before the sealing and delivery of these presents the receipt and payment whereof the said parties of the first part do hereby acknowledge and thereof and of every part and parcel thereof do exonerate, acquit and discharge the said United States by these presents they the said parties of the first part have given, granted, bargained, sold, released, enfeoffed, conveyed and confirmed and by these presents do grant, bargain, sell, release, enfeoff, convey and confirm unto the United States of America. 123

All that certain tract, piece or parcel of land, situate, lying and being in the said County of Monmouth and called Sandy Hook, bounded southwardly by a line running east from the mouth of Youngs Creek at Low Water to the Sea and on every other side by the Sea, except only four acres of land sold and conveyed by Robert Hartshorne and Esek Hartshorne to John Cruger, Philip Livingston, Leonard Lispenard and William Bayard by a certain deed bearing date the tenth day of May in the year of our Lord one thousand seven hundred and sixty two which said four acres are now the property of the said United States and

upon which said four acres the Light House now stands and also excepting all that part of the said tract which by a certain deed bearing date the 26th day of February in the year of our Lord one thousand eight hundred and six was also conveyed to the said United States and which in the deed last aforesaid is described as all that certain lot or tract of land being part of a certain tract of land called Sandy Hook in the said County of Monmouth bounded and described as follows, that is to say,

All that part of the point of land in the said County of Monmouth lying on the north side of a line drawn east and west through the present Light House on Sandy Hook.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders of all and singular the lands, tenements, hereditaments and premises hereby granted and conveyed or mentioned to be hereby granted and conveyed, and every part and parcel thereof, and all the rents, issues, services and profits thereto and to every part thereof belonging or appertaining. And also all the estate, right, title, interest, dower and right of dower, claim and demand whatsoever, both in law and equity of the said parties of the first part or either of them in or to the same lands, tenements, hereditaments and premises and every part and parcel thereof.

To have and to hold the said lands, tenements, hereditaments and premises hereby granted, bargained and sold or mentioned or intended to be hereby granted, bargained and sold and every part and parcel thereof with their and and every of their appurtenances unto the said United States of America and their assigns to the only proper use, benefit and behoof of the said United States of America and their assigns forever. And the said Richard Hartshorne for himself, his

heirs, executors and administrators and for every 127
of them doth covenant and grant to and with the
said United States of America and their assigns by
these presents in manner and form following that
is to say, that the said Richard Hartshorne now is
the true and lawful owner of the said lands, tene-
ments, hereditaments and premises hereby granted
and conveyed and of every part and parcel thereof
with their and every of their appurtenances and is
rightfully and absolutely seized thereof of a good,
sure, absolute and indefeasible estate of Inherit-
ance in fee simple, without any manner of condi-
tion, trust, proviso, or limitation of use and uses
or other restraint matter or thing whatsoever, to
alter, change, charge, incumber or defeat the same. 128
And that the said Richard Hartshorne now hath
good right, full power and lawful authority in him-
self to grant, bargain, sell and convey all and sin-
gular the said lands, tenements, hereditaments and
premises hereby granted and conveyed or mentioned
to be hereby granted and conveyed as aforesaid
and every part and parcel thereof with the appur-
tenances unto the said United States of America
and their assigns to the only proper use of the said
United States and their assigns in manner and form
aforesaid and that the said United States of
America and their assigns and every of them shall
or lawfully may from time to time and at all times 129
hereafter have, hold, occupy, use, possess and en-
joy all and singular the said lands, tenements,
hereditaments and premises hereby conveyed or
mentioned or intended to be hereby conveyed and
every part and parcel thereof with their and
every of their appurtenances without any
manner of let, suit, trouble, eviction, dis-
turbance or molestation whatever of or by
the said Richard Hartshorne, his heirs or assigns
or any other person or persons whatever lawfully
claiming or to claim the said lands, tenements,
hereditaments and premises or any part or parcel
thereof, and that the said lands, tenements, hered-

130 itaments and premises hereby granted and conveyed or mentioned or intended to be hereby granted and conveyed as aforesaid, and every part and parcel thereof with their and every of their appurtenances now are and be and forever hereafter shall continue, remain and be unto the said United States of America and their assigns, free and clear and freely and clearly and absolutely freed and acquitted, exonerated and discharged of and from all and all manner of former and other bargains, sales, grants, devises, uses, jointures, dowers, mortgages, judgments and all debts of record and incumbrances whatsoever had made, ac-
131 knowledged or suffered or cause to be had made, acknowledged or suffered by the said Richard Hartshorne or by any other person or persons whatsoever, and the said Richard Hartshorne for himself, his heirs, executors and administrators and for every of them doth further covenant and grant to and with the said United States of America and their assigns and with every of them by these presents that the said Richard Hartshorne his heirs and assigns and all and every other person whatsoever having or lawfully claiming or who shall or may at any time or times hereafter have or lawfully claim any estate, right, title, or interest of, in or to the said lands, tenements, hereditaments and premises hereby granted and conveyed
132 or mentioned or intended to be hereby granted, and conveyed or of in or to any part or parcel thereof shall and will from time to time and at all times hereafter at and upon the reasonable request of the said United States or their assigns or of any person acting in behalf of the said United States and at the costs and charges in the law of the said United States or their assigns make do levy, execute, acknowledge, and suffer or cause to be made, done, levied, executed, acknowledged and suffered all and every such further and other reasonable act and acts, thing and things, devise and devises, assurance and as-

surances, conveyance and conveyances in the law whatsoever for the better and more perfect assurance of the said lands, tenements, hereditaments and premises hereby granted and conveyed or mentioned or intended to be hereby granted and conveyed or any of them and of every or any part or parcel thereof with all and singular their and every of their appurtenances unto the said United States and their assigns according to the true intent and meaning of these presents as by the said United States, and their assigns or any of them or by their or any of their counsel learned in the law shall or may be reasonably advised, devised or required, and the said Richard Hartshorne for himself, his heirs, executors, and administrators hereby releases to the said United States and their assigns all the covenants and agreements in the said deed bearing date the tenth day of May in the year of our Lord one thousand seven hundred and sixty-two contained on the part of the said John Cruger, Philip Livingston, Leonard Lispenard, and William Bayard to be kept and performed. And the said Richard Hartshorne for himself, and his heirs, doth hereby grant that the said Richard Hartshorne and his heirs the lands, tenements, hereditaments and premises hereby granted and conveyed or mentioned or intended to be hereby granted and conveyed and every part and parcel thereof will all and singular their and every of their right, members and appurtenances unto the said United States of America and their assigns against the said Richard Hartshorne, his heirs and assigns against all and every other person and person whatsoever shall and will warrant and forever defend by these presents. 133 134 135

In witness whereof the said Richard Hartshorne hath hereunto set his hand and seal the day and year first above written.

Susanna Hartshorne (L. S.).
Rich Hartshorne (L. S).

Sealed and delivered in presence of John Aspinwall, Joseph S. Gallagher.

136 *City of New York*, ss.:

On the 7th of June, 1817 before me, Brockholst Livingston, an Associate Justice of the Supreme Court of the United States, came the grantors within named who severally acknowledged that they had executed the within deed and the within named Susanna Hartshorne being examined by me separate and apart from her husband acknowledged that she had executed the same without any fear, threat or compulsion on his part. I do therefore allow it to be recorded.

B. LIVINGSTON.

137 The within written deed does in my opinion convey to the United States a good and indefeasible title to the land and premises therein particularly described, New York, June 17th, 1817.

JOHN FISKE, Atty., U. S.

Rec'd and recorded June 27th, 1817 (Compared).

G. LLOYD, Clerk.

The following stipulation, with reference to the boundary line, mentioned in the statute of New Jersey before mentioned, approved March, 1846, and the accompanying map was then put in evi-

138 dence :

It is stipulated that the defendant may put in evidence the copy of a map of Sandy Hook, New Jersey, surveyed and drawn under the direction of Lieut. Col. Gillespie, which is marked Exhibit 18, without further proof that the southern boundary line, marked "Old U. S. boundary", as shown on said map, is the boundary mentioned in the Statute of the State of New Jersey, approved March, 1846, page 124, Laws of that year.

December 15, 1903.

The map above referred to is not reproduced herein. The "Old U. S. boundary" is indicated on the chart, Exhibit A and 2.

Defendant also put in evidence the Statute of 139
the State of New Jersey, passed February 26th, 1834, printed on page 118 of the Statutes of 1833 and 1834, and the Act of Congress of the United States, approved June 28. 1834, printed at page 708 of the 4th volume of the United States Statutes at Large..

The statute of New Jersey is as follows:

An Act to ratify and confirm an agreement made between the Commissioners appointed by the Governor of the State of New York and the Commissioners appointed by the Governor of the State of New Jersey respecting the territorial limits and jurisdiction between the said States.

WHEREAS, Commissioners duly appointed on the 140
part of the State of New York and Commissioners duly appointed on the part of New Jersey for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States have executed certain articles, two copies for each State, which are contained in the following words:

AGREEMENT made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, Commissioners duly appointed on the part and behalf of the State of New York, in pursuance of an act of the Legislature of the said State, entitled "An act concerning the territorial limits and jurisdiction of the State of New York and the State of New Jersey", passed January 18th, 1833, of the one part, and Theodore Frelinghuysen, James Parker and Lucius Q. C. Elmer, 141
Commissioners, duly appointed on the part and behalf of the State of New Jersey, in pursuance of an act of the Legislature of the said State entitled "An act for the settlement of the territorial limits and jurisdiction between the States of New Jersey and New York", passed February 6th, 1833, of the other part.

ARTICLE I.—The boundary line betwen the two States of New York and New Jersey, from a point in the middle of Hudson River, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the bay of New York, of the

142 water between Staten Island and New Jersey, and of Raritan Bay, to the main sea, except as hereinafter otherwise particularly mentioned.

* * * * * *

THEODORE FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q. C. ELMER,
B. F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR.

THEREFORE,

BE IT ENACTED by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, That the aforesaid agreement, and every article, clause, matter and
143 thing, therein contained, shall be and the same is hereby fully and amply ratified and confirmed on the part of the State of New Jersey.

Passed February 26, 1834.

Defendant then called Rogers Birnie, who was sworn, and testified as follows:

I am a Major in the Ordnance Department of the United States Army. I have been in the army since 1868, when I entered West Point. I am thoroughly familiar with the Peninsula at Sandy
144 Hook shown on the chart, Exhibit 2, north of the United States Boundary Line.

I was transferred to the Ordnance in 1878, and visited the proving ground on that Peninsula about that time, and have frequently visited it since, and have been on duty there since July, 1899. Since 1878, the Government of the United States has used that Peninsula, that is to say, the land portion, bordering on the outer waters for firing over land range north to the neck of land, swinging around from its southerly direction to about an easterly direction or a little more, even sometimes firing to the north of east. In all that quadrant from the land southeast to the north-

east, firing has been done over water for ranges 145
sometimes up to about thirteen thousand yards, something over eight miles. In the last four years, this firing has been going on daily except Sundays. The magnitude of the work at the proving grounds has increased very much during the last ten years. Prior to that time there was firing going on, as I know from the records, since 1874 ; firing at any time when a gun might be ready to test, practically daily.

On being cross examined the witness testified:

I know where the Scotland Lightship is located.

Q. What direction from the Scotland Lightship is it over the water for the purpose of testing guns, 146
at the point you have indicated? A. On each side of it, both towards the south and toward the east. I should say that the Scotland Lightship is a little to the east or southeast from the firing point, and we would come around about forty-five degrees from that towards the east and north, that is to say, the firing would be done in the direction of the Lightship there, to about forty-five degrees to the north of it. I was on duty there in August, 1901. Firing is going on whenever there is a gun to test.

Q. Do you state in August and September, 1901, they were testing guns there daily? A. I will state that to the best of my knowledge and belief. As 147
my mind now serves, I was present during the month of August, 1901, at the place I have indicated, where firing is conducted by the Government. I was present in my capacity as a member of the Ordnance Board in charge of the experiments there. Records are kept for the purposes of determining what guns are tested, and the result. I have not made any examination of these records for the purpose of determining what was done with reference to the firing of guns on the 17th of August, 1901. I was not notified so to do.

Defendant also gave evidence tending to show that according to the physical laws of nature, the

148 schooner *James Gordon Bennett* must have sunk to the bottom immediately after the collision, and that it was not physically possible for her to drift from the place where she sank any considerable distance, and certainly not to a distance of over 100 feet, and upon cross examination of witnesses so testifying, testimony was adduced by plaintiffs tending to establish that all the knowledge of such witnesses regarding wrecks and what happens in respect to their immediately sinking and drifting was exclusively acquired on land, and in the laboratory, and not from any personal observation thereof or experience therewith on the ocean, but
149 that they had studied scientifically the physical laws of nature governing such subjects, and made experiments in mechanics and physics, and on friction and on the displacement of bodies. But inasmuch as by the previous decision of the Appellate Division of the Supreme Court in this case, it was held that there was evidence to go to the jury, as to whether or not the collision happened at or near the point marked on the chart Ex. A and 2, X *Alene* Wreckage, and as the Court of Appeals of the State of New York has no jurisdiction to review this decision of the Appellate Division, this testimony is not stated in full.

Defendant then at the request of plaintiff, and in
150 order to avoid unnecessary calling of witnesses to that effect, admitted that the pilotboats and other vessels plying in and out of the port of New York at times pass over all of the water used by the United States officials in discharging guns at Sandy Hook, over which the firing testified to by Major Birnie took place.

The defendant asked the Court to direct a verdict for the defendant, upon the following grounds:

Defendant claims the right, under the statute of the United States confirming and approving the agreement as to boundaries between the State of New York and the State of New Jersey, to be

free in navigating the main sea to the eastward of Sandy Hook Peninsula, from the operation of any law of the State of New Jersey giving a right of action for injuries causing death, and claims that under the statutes aforesaid, the jurisdiction of that State extends only to the main sea; that is to say, low water mark along its exterior coast line and to a line drawn from headland to headland across the entrance to the Bay of New York. It, therefore, asks the Court to direct the jury to return a verdict for the defendant, on the ground that it appears by uncontradicted evidence that the collision between the SS. *Alene* and the schooner *James Gordon Bennett*, to recover damages for which this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook Peninsula, and at a distance of more than a mile to the eastward of low water mark upon the exterior line thereof. 151 152

Defendant claims the right, by reason of the purchase by the United States of the Sandy Hook Peninsula, and the cession to the United States by the State of New Jersey of jurisdiction over the the same and the long continued use of that peninsula, and of the main sea to the eastward of it for military purposes, to be free in navigating the main sea to the eastward of that peninsula from the operation of any law of the State of New Jersey, giving a right of action for injuries causing death, and claims that the main sea to the eastward of said peninsula to a distance of three miles from the shore is subject to the exclusive jurisdiction of the United States. It, therefore, asks the Court to direct the jury to return a verdict for the defendant, on the ground that it appears by uncontradicted evidence that the collision between the SS. *Alene* and the schooner *James Gordon Bennett*, to recover damages for which this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook Peninsula, and at 153

154 a distance of more than a mile to the eastward of low water mark, upon the exterior line thereof.

The Court denied the motion, and defendant excepted. The Court thereupon charged the jury upon the issues in the case, but inasmuch as no exception was taken to the charge, and it did not cover any of the points mentioned in the motion to direct a verdict, the charge is not given.

The jury returned a verdict for the plaintiff for fifteen thousand dollars.

Before the entry of judgment, defendant moved for a new trial, upon the exceptions aforesaid and because the verdict was contrary to the evidence and contrary to the law; and because the damages
155 were excessive. The plaintiff thereupon consented to a reduction of the verdict to ten thousand dollars.

> *The Court.*—The verdict is reduced to Ten thousand dollars by consent. The motion for a new trial is denied.

The above case, containing exceptions, contains all the evidence material to the exceptions therein stated and to the motion for a new trial on the ground that the damages were excessive.

Inasmuch as the exceptions aforesaid do not appear upon the record, the Justice before whom the case was tried hereby signs the foregoing case,
156 containing such exceptions, and orders it to be annexed to the judgment-roll herein.

City and County of New York, ss.: 157

CLARENCE B. SMITH, being duly sworn, says:
I am a member of the firm of Wheeler, Cortis & Haight, defendant's attorneys in this action. No written opinion was rendered by the Judge before whom the case was tried.

CLARENCE B. SMITH.

Sworn to before me this 19th day of April, 1903.

HARRY M. HEWITT,
Notary Public,
New York County.

158

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing are true copies of the original notice of appeal, judgment roll, order denying new trial, and case and exceptions on file in the Office of the Clerk of the County of New York, and certification thereof by the Clerk of the County of New York is hereby waived.

Dated April 20, 1904.

LAMB, OSBORNE & PETTY,
Plaintiff's Attorneys. 159

WHEELER & CORTIS,
Defendant's Attorneys.

The within case having been duly settled by consent, I hereby sign the same, and order it to be amended to the judgment roll herein; and I further order this printed copy to be filed as the original case on appeal herein.

JAMES A. O'GORMAN,
J. S. C.

Dated April 21, 1904.

ORDERED, on the foregoing stipulation that the printed case herein be filed with the Clerk of the Appellate Division.

J. A. O'GORMAN,

160 An opinion of the Court of Appeals in this case is subjoined:

COURT OF APPEALS.

MINNIE GRUBE, as Administratrix, etc.,
Respondent,

vs.

HAMBURG-AMERICAN PACKET COMPANY,
Appellant.

161

Appeal from a judgment of the Appellate Division, First Department, affirming a judgment entered upon a verdict, and from an order denying a motion for a new trial.

EVERETT P. WHEELER, for Appellant.
GILBERT D. LAMB, for Respondent.

WERNER, J.

The Appellate Division has unanimously affirmed the judgment entered upon the verdict for the plaintiff herein. Upon the record presented to us
162 we deem it necessary to discuss only a single question, and that is raised upon the refusal of the trial court to charge two requests which we think defendant's counsel was entitled to have submitted to the jury. A brief statement of the material facts will disclose the relevancy and importance of these requests. The action is one for damages for alleged negligence which resulted in the death of plaintiff's intestate. On the 17th day of August, 1901, the steamer *Alene*, owned by the defendant, and the pilot schooner *James Gordon Bennett*, owned by a New Jersey corporation, collided in the vicinity of Scotland Lightship, in the harbor of New

York, with the result that the schooner went 163
to the bottom and carried several of her crew with her. Among those who perished was plaintiff's intestate. One of the questions litigated was that of jurisdiction, which depended upon conflicting evidence and which, upon the record before us, the unanimous affirmance below has concededly and conclusively resolved in favor of the plaintiff. Another contested question was that of defendant's alleged negligence, and this in turn depended, in some degree, upon the existence or absence of negligence in the sailing of the schooner, in the wreck of which plaintiff's intestate lost his life. Defendant contended, and introduced evidence 164
tending to prove, that at the time of the collision there was no one at the wheel of the schooner and that she had no "lookout". This was controverted by evidence tending to show that all hands were on deck of the schooner with the exception of four pilots, and the steward, the plaintiff's intestate.

As it is conceded that plaintiff's intestate was free from contributory negligence, the trial court correctly charged that concurring negligence in the navigation of both vessels would not defeat plaintiff's right to recover, because if that were the fact she could bring her action against either or both of the guilty parties. But, on the other hand, it is 165
obvious, even upon the somewhat nebulous state of the record with reference to the relative positions of the vessels just before the collision, that the question of defendant's negligence depended somewhat upon the degree of care exercised in the navigation of the schooner. It was, therefore, important that any request bearing directly upon that subject should have been explicitly charged.

The requests referred to were as follows:

"4. When the schooner had changed her course and headed to the westward, it was Captain Mix's duty to keep a man at the wheel and not allow her to drift before the wind".

"5. It was also his duty to keep a lookout after

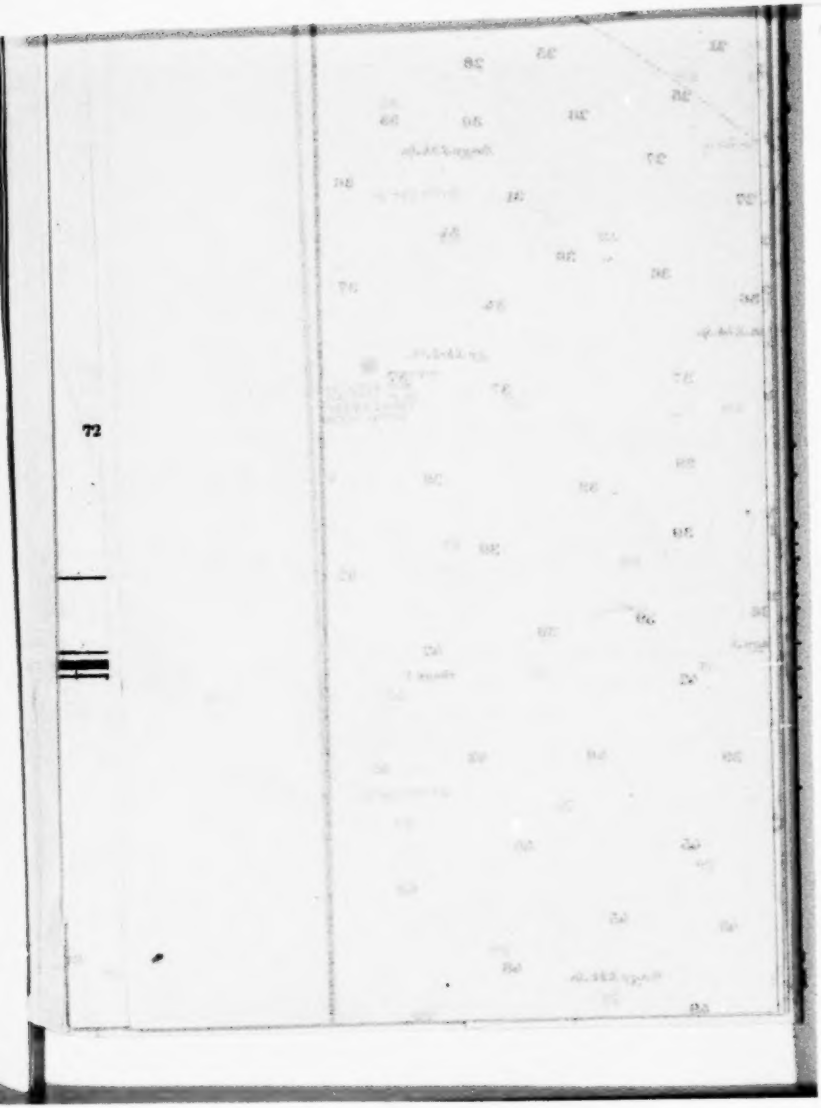
166 the schooner had changed her course and was headed to the westward".

Upon these requests the court charged, "It is "the claim of the defendant, that at the time of "the accident there was no one at the wheel of the "schooner and that there was no lookout. It is for "you to say, in the light of all the evidence, just "what the facts are; and if you find them to be as "claimed by the defendant, it is still for you to "say whether those omissions, if they were omis-"sions, contributed to the happening of the acci-"dent."

We are inclined to the view that this charge did
167 not fairly and fully cover the requests, and that the defendant was entitled to have a charge substantially in the language of the requests. While, as we have said, negligence on the part of those in charge of the schooner would not necessarily absolve those in command of the steamer from the charge of negligence, yet the questions of separate and concurring negligence were so interdependent that the rules of law pertaining to these questions, above all others, should have been clearly and precisely stated to the jury. As an abstract proposition it goes without saying that the duties of wheelman and lookout upon vessels navigating the high seas, are of the highest importance and, in case of collision,
168 their conduct is always the subject of minute scrutiny. As applied to the case at bar the effect of the alleged absence of two such important functionaries in the management of the schooner presented, of course, a question for the jury, but the defendant had the right to a proper charge upon that subject.

It would undoubtedly be going too far to say that the refusal of the court to charge as requested was clearly controlling of the verdict found, and yet it would not be going far enough to arbitrarily assume that it had no effect whatever. Therefore, we think the refusal to charge as requested was error for which the judgment herein should be reversed and a new trial granted with costs to abide the event.

MAP(S) IS/ARE TOO LARGE TO BE FILMED



Supreme Court, Appellate Division, First Department.

MINNIE GRUBE, as Administratrix of the Goods, Chattels, and Credits of John Grube, Deceased, Plaintiff-Respondent,
vs.
HAMBURG AMERICAN STEAMSHIP COMPANY, Defendant-Appellant.

O'Gorman, J.

SIRS: You will please to take notice, that the appeal from the judgment dated December 30th 1903, and from the order herein entered January 11th 1904 in the above entitled action will be brought on for argument before this honorable court, at a term thereof, to be held at the appellate division court house, in the borough of Manhattan, city of New York on the 7th day of June, 1904, at the opening of the court on that day, or as soon thereafter as counsel can be heard. And that a preference on the calendar in the argument thereof is claimed on the ground that the sole plaintiff is an administrator, pursuant to section 791 of the code of civil procedure.

Dated, New York, May 10th, 1904.

Yours, etc., LAMB, OSBORNE & PETTY,
Attorneys for Plaintiff-Respondent,
253 *Broadway, Borough of Manhattan, City of New York.*

To Messrs. Wheeler, Cortis & Haight, attorneys for defendant-appellant, 21 State street, borough of Manhattan, city of New York.

[Endorsed:] Supreme court, appellate division. Minnie Grube, as adm'r'x, etc., plaintiff, *vs.* Hamburg American Steamship Company, Copy. Respondent's notice of argument with claim of preference. Lamb, Osborne & Petty, att'ys for respondent, 253 Broadway, New York city, New York. Due service of a copy of the within notice of argument with claim of preference is hereby admitted. New York, May 10, 1904. —— ——, attorneys for appellant. Received copy May 10 1904 Wheeler, Cortis & Haight. Filed May 11 1904.

New York Supreme Court, Appellate Division, First Department.

MINNIE GRUBE, as Administratrix, &c.,
against
THE HAMBURG AMERICAN STEAMSHIP COMPANY. } Notice of Argument

Please to take notice, that the appeal in the above action will be brought on for argument before this honorable court, at a stated

term thereof, to be held at the appellate division court house, Manhattan, New York on the 7th day of June, 1904, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated the 9th day of May 1904.

Yours, &c.,

WHEELER, CORTIS & HAIGHT,
Attorneys for Defendant, 21 State Street, New York City.

To Lamb, Osborne & Petty, Esqs., attorneys for plaintiff.

[Endorsed:] New York supreme court, appellate division, first department Minnie Grube, as adm'x, &c., against The Hamburg-American Steamship Company. Notice of argument. Wheeler, Cortis & Haight, 21 State street, New York, attorneys for defendant. N. Y. May 9th 1904 Admit due service of the within notice. Lamb, Osborne & Petty, attorneys for pl'ff.

New York Supreme Court, Appellate Division, First Department.

MINNIE GRUBE, as Administratrix, &c.,
against
THE HAMBURG AMERICAN STEAMSHIP COMPANY.

COUNTY OF NEW YORK, *ss:*

John W. Griffin, being duly sworn, deposes and says, I am a clerk in the office of Wheeler, Cortis & Haight, attorneys for defendant herein. On the 21st day of April, 1904, I served three copies of the case on appeal herein upon Messrs. Lamb, Osborne & Petty, attorneys for the plaintiff herein at their office No. 253 Broadway, New York city.

JOHN W. GRIFFIN.

Sworn to before me this 9th day of May, 1904.

HARRY M. HEWETT,
Notary Public, N. Y. Co.

At a term of the appellate division of the supreme court held in and for the first judicial department in the court house thereof in the county of New York on the 24th day of June, 1904.

Present: Hon. Charles H. Van Brunt, P. J.; Hon. Edward Patterson, Hon. George L. Ingraham, Hon. Chester B. McLaughlin, Hon. Frank C. Laughlin, JJ.

MINNIE GRUBE, as Administratrix of the Goods, Chattels, and Credits of John Grube, Deceased, Plaintiff,
vs.
THE HAMBURG AMERICAN STEAMSHIP COMPANY, Otherwise Known as the Hamburg Amerikanische Packetfahrt Actien Gesellshaft, Defendant.

The defendant herein having appealed to the appellate division of the supreme court from the judgment entered herein in the office

of the clerk of the county of New York, the clerk of said supreme court on the 30th day of December, 1903, in favor of the plaintiff and against the defendant for the sum of $11,048.71/100 and also from an order made at the trial term of the said supreme court, denying defendant's motion for a new trial and entered in the office of the clerk of the county of New York, the clerk of said supreme court, on the 24th day of December, 1903, and said appeal coming duly on to be heard on June 9th, 1904, and after hearing Everett P. Wheeler, Esq., of counsel for the defendant in support of said appeal, and Gilbert D. Lamb, Esq., of counsel for plaintiff in opposition thereto, and due deliberation having been had thereon, and this court having stated :—

"Upon plaintiff's stipulating to reduce judgment as entered for damages, costs and allowances, etc., to the sum of $8,423.71/100, judgment as so modified will be affirmed without costs, otherwise judgment and order will be reversed and new trial ordered, costs to abide event." And the plaintiff having so stipulated to reduce said judgment a stipulation to that effect being annexed hereto,

Now, on motion of Lamb, Osborne & Petty, attorneys for plaintiff herein, it is

Unanimously ordered that the said judgment as so reduced to the sum of $8,423.71/100 and the said order appealed from be and they hereby are affirmed without costs of this appeal to either party.

Ent.

Appellate Division of the Supreme Court, State of New York, First Judicial Department.

Clerk's Office, New York County.

M. GRUBE, Adm'x,
vs.
HAMBURG AMERICAN STEAMSHIP CO.

I, Alfred Wagstaff, clerk of the appellate division of the supreme court in the first judicial department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above-entitled action or proceeding, and entered in my office on the 8th day of July 1904, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New York, this 11th day of July 1904

[Seal Supreme Court, Appellate Division, First Department.]

ALFRED WAGSTAFF, *Clerk.*

Supreme Court, New York County.

MINNIE GRUBE, as Administratrix of the Goods, Chattels, and Credits of John Grube, Deceased, Plaintiff,
vs.
THE HAMBURG AMERICAN STEAMSHIP COMPANY, Otherwise Known as The Hamburg Amerikanische Packetfahrt Actien Gesellshaft, Defendant.

Plaintiff herein hereby stipulates and consents that the judgment heretofore entered herein in the office of the clerk of the county of New York on December 30th, 1903, in favor of the plaintiff and against the defendant for the sum of $11,048.71/100 consisting of damages, costs and allowances &c., be reduced to the sum of $8,423.71/100.

Dated, New York, June 25th 1904.

MINNIE GRUBE, *Plaintiff.*

CITY OF NEW YORK
County of New York, } *ss:*

On this 1st day of July, 1904, before me personally appeared Minnie Grube, to me known and known to me to be the plaintiff in the above entitled action and the individual described in and who executed the fore-going instrument and she duly acknowledged to me that she executed the same.

JOSEPH R. FRITH, JR.,
Notary Public 34, *County of New York.*

[Endorsed:] Supreme court New York county. H. Minnie Grube, as administratrix of the goods, chattels and credits of John Grube, deceased, plaintiff, against The Hamburg American Steamship Company, defendant. Copy. Remittitur. Lamb & Petty, attorneys for plaintiff. Office and post office address, Postal Telegraph building, 253 Broadway, borough of Manhattan, city of New York, New York. Filed Jul- 12 1904

Supreme Court, New York County.

MINNIE GRUBE, as Administratrix of the Goods, Chattels, and Credits of John Grube, Deceased, Plaintiff,
vs.
THE HAMBURG AMERICAN STEAMSHIP COMPANY, Otherwise Known as The Hamburg Amerikanische Packetfahrt Actien Gesellshaft, Defendant.

The appeal of the defendant dated, January 26, 1904, from the judgment in this action entered in the office of the clerk of the county of New York on the 30th day of December, 1903, in favor

of plaintiff and against the defendant for the sum of $11,048.71 / 100 and also from an order entered in the office of the clerk of the county of New York on the 11th day of January 1904, denying defendant's motion for a new trial, coming on to be heard at the appellate division, first department, and said appeal having been duly argued, and an order having been entered at said appellate division reducing the said judgment as entered to the sum of $8,423.71 / 100 and affirming said judgment as so reduced without costs of said appeal, it is on motion of Lamb, Osborne & Petty, attorneys for plaintiff,

Adjudged that the said judgment as entered and as so reduced to the sum of $8,423.71 / 100 be and the same hereby is affirmed without costs of said appeal to either party.

Dated July 13, 1904.

[Seal of New York.]

THOS. L. HAMILTON, *Clerk.*
M. J. D.

[Endorsed:] 35. Supreme court New York county. Minnie Grube, as administratrix of the goods, chattels and credits of John Grube, deceased, plaintiff, against The Hamburg American Steamship Company, defendant. Judgment. Lamb, Osborne & Petty attorneys for plaintiff. Office and post office address, Postal Telegraph building, 253 Broadway, borough of Manhattan, city of New York, New York. E. J. H., 50c. Filed July 13, 1904, 10 h. 37 m.

SIR: Please take notice that the within is a copy of a judgment this day duly entered in the within mentioned action in the office of the clerk of the within named court.

Dated New York, July 1, 1904.

Yours, &c., LAMB, OSBORNE & PETTY,
Attorneys for Plaintiff.

253 Broadway, borough of Manhattan, city of New York.

To —— ——, attorney for —.

Supreme Court of the United States.

THE HAMBURG AMERICAN STEAMSHIP COMPANY, Plaintiff in Error,
against
MINNIE GRUBE, as Administratrix of John Grube, Defendant in Error.

To the Supreme Court of the United States:

The petition of The Hamburg American Steamship Company, a corporation incorporated under the laws of the Empire of Germany and the free city of Hamburg, and having a principal place of busi

ness in the city, county and State of New York, defendant in the above entitled action, respectfully shows to this court:

That a judgment affirming the judgment of the supreme court of the State of New York in this action, was rendered herein by the appellate division of the supreme court of the State of New York on the 13th day of July, 1904.

Pursuant to the provisions of the Code of Civil Procedure of the State of New York, a motion was afterwards made to the said appellate division, to certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals of said State. Said motion was, on the 14th day of October, 1904, denied by the said appellate division. Subsequently thereto, pursuant also to the provisions of said Code of Civil Procedure, an application was made to the Honorable Edgar M. Cullen, chief judge of the court of appeals, to allow an appeal from the said appellate division of said supreme court, to the court of appeals. The said chief judge refused to allow an appeal on the ground that the questions involved in the record were Federal questions, and should be reviewed by the Supreme Court of the United States.

The said appellate division of the supreme court of the State of New York is the highest court of said State in which a decision in this action could be had. In the said action rights, privileges and immunities were claimed by your petitioner under the Constitution and statutes of the United States, and under authority exercised under the United States, and the decision of the said appellate division was against the rights, privileges and immunities especially set up and claimed under said Constitution, statutes and authority. Your petitioner, therefore, desires to avail itself of the law and practice in such case made and provided by a writ of error from the Supreme Court of the United States. Your petitioner therefore prays that the said writ may be allowed by this court. And your petitioner will ever pray.

Dated, New York, October 19th, 1904.

THE HAMBURG AMERICAN
STEAMSHIP COMPANY.
EMIL L. BOAS, *General Manager.*

EVERETT P. WHEELER, *Of Counsel.*

COUNTY OF NEW YORK, *ss:*

Emil L. Boas being duly sworn, deposes and says: That he is the agent in the port of New York of The Hamburg American Steamship Company, the petitioner above named. That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except the allegations as to the proceedings in the court of appeals, as to which an affidavit is submitted.

Deponent further says that the petitioner is a corporation and that therefore this affidavit is made by him as its agent.

EMIL L. BOAS.

Sworn to before me this 19th day of October, 1904.

[Seal of Harry Mason Hewitt, Notary Public, New York.]

HARRY M. HEWITT,
Notary Public, New York County.

Supreme Court of the United States.

THE HAMBURG AMERICAN STEAMSHIP COMPANY, Plaintiff in Error,
against
MINNIE GURBE, as Administratrix, &c., Defendant in Error.

STATE OF NEW YORK, *Southern District of New York*, } ss:

Clarence B. Smith, being duly sworn, deposes and says: I am of counsel for The Hamburg American Steamship Company in the suit brought against it in the supreme court in the State of New York by Minnie Grube, as administratrix of John Grube, deceased. On behalf of said company on the 18th day of October instant I applied to the Honorables Edgar M. Cullen, chief judge of the court of appeals of the State of New York for leave to appeal to that court from the judgment of the appellate division of the supreme court of the State of New York in and for the first department, rendered in favor of the said Minnie Grube as administratrix and against the said company, in July, 1904. The said chief judge denied the said application and made thereon memorandum of which the following is a copy.

"Application for leave to appeal to the court of appeals denied on the ground that the question ought to be reviewed as a Federal question, the ultimate decision of which must be made by the U. S. Supreme Court and that a review of the question by that court can be had by a writ of error to the appellate division, thus avoiding the expense and delay attendant on appeal to the court of appeals."

(Signed) EDGAR M. CULLEN,
Ch. Judge Ct. of Ap'l.

Oct. 18/04.

CLARENCE BISHOP SMITH.

Sworn to before me this 19th day of October, 1904.

[Seal of Harry Mason Hewitt, Notary Public, New York.]

HARRY M. HEWITT,
Notary Public, N. Y. Co.

Due service of a copy of the within petition & affd. is hereby admitted, New York, Oct. 21st 1904, — att'ys for def't in error.

LAMB, OSBORNE & PETTY,
For Minnie Grube, as Adm'x.

[Endorsed:] United States Supreme Court. The Hamburg American Steamship Company, plaintiff in error against Minnie Grube as adm'r'x of John Grube, defendant in error. Petition & affidavit. Everett P. Wheeler, att'y for pl'ff in error 21 State street, New York city, N. Y. Received Oct. 27 1904. Thos. L. Hamilton, c'k.

UNITED STATES OF AMERICA, *ss:*

To Minnie Grube, as administratrix, &c., of John Grube, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 21st day of November, 1904, pursuant to a writ of error filed in the clerk's office of the appellate division of the supreme court of the State of New York in and for the first department, wherein The Hamburg American Steamship Company is plaintiff and you are defendant in — to show cause if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, justice of the said Supreme Court of the United States this 20th day of October, in the year of our Lord one thousand nine hundred and four.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

Due service of a copy of the within citation is hereby admitted, New York, Oct. 21st, 1904, — att'ys for def't in error.

LAMB, OSBORNE & PETTY,
For Minnie Grube, as Adm'x.

[Endorsed:] Supreme Court of the United States. The Hamburg American Steamship Company, plaintiff in error against Minnie Grube as adm'r'x of John Grube, defendant in error Citation Everett P. Wheeler, att'y for pl'ff in error 21 State street, New York city, N. Y. Received Oct. 27 1904. Thos. L. Hamilton.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the justices of the appellate division of the supreme court of the State of New York in and for the first department, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the appellate division of the supreme court of the State of New York in and for the first department, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Minnie Grube as administratrix of John Grube, deceased, plaintiff, and The Hamburg American Steamship Company, defendant, wherein rights, privileges and immunities are claimed under the Constitution and statutes of the United States and under authority exercised under the United States, and the decision was against the rights, privileges and immunities specially set up or claimed under such Constitution, statutes and authority, a manifest error has happened to the great damage of the said Hamburg American Steamship Company, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you may have the same at Washington on the 21st of November next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States the 20 day of Oct. in the year of our Lord one thousand nine hundred and four.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed Oct. 20, 1904.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

323.

STATE OF NEW YORK, }
County of New York, } ss:

I, Thos. L. Hamilton, clerk of the said county, and clerk of the supreme court of said State for said county, do certify, that the annexed is the original record, citation and writ of error received and attached thereto, Minnie Grube as adms. &c., *vs.* Hamburg-American Steamship Company on file in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 28th day of Oct. 1904.

[Seal of New York.]

THOS. L. HAMILTON, *Clerk.*

Due service of a copy of the within writ of error is hereby admitted, New York, Oct. 21 1904, — att'ys for def't in error.

LAMB, OSBORNE & PETTY,
For Minnie Grube, as Adm'x.

[Endorsed:] Supreme Court of the United States. The Hamburg American Steamship Co. plaintiff in error, against Minnie Grube as adm'r'x of John Grube, defendant in error Writ of error. Everett P. Wheeler, att'y for pl'ff in error, 21 State street, New York city, N. Y. Received Oct. 27 1904 Thos. L. Hamilton cl.

New York Supreme Court, Appellate Division, First Department.

MINNIE GRUBE, Administratrix of the Estate of John Grube, Deceased, Plaintiff in Error,
against
THE HAMBURG AMERICAN STEAMSHIP COMPANY, Defendant in Error.

Know all men by these presents: that we, the Hamburg American Steamship Company, a corporation incorporated under the laws of the Empire of Germany and the free city of Hamburg, and having a principal place of business in the city, county and State of New York, as principal, and the United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and having an office and regular place of business in the city, county and State of New York, as surety, are held and firmly bound unto Minnie Grube, as administratrix of the estate of John Grube, deceased, in the sum of eleven thousand dollars ($11,000), lawful money of the United States of America, to the payment of which well and truly to be made, the

said principal, and the said surety, bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of October, in the year one thousand nine hundred and four.

Whereas, in the above entitled action the New York supreme court, appellate division, first department, rendered its judgment on the 13th day of July, 1904, affirming the judgment of the New York supreme court, New York county, and the said The Hamburg American Steamship Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said New York supreme court, appellate division, first department, to reverse the judgment in the aforesaid suit, and a citation directed to the said Minnie Grube, administratrix of the estate of John Grube, deceased, citing and admonishing her to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof;

Now, the condition of this obligation is such, that if the said The Hamburg American Steamship Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

THE HAMBURG AMERICAN STEAMSHIP COMPANY.
EMIL L. BOAS, *General Manager.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest:
[SEAL.] GEORGE E. HAYES, *Attorney-in-Fact.*

Sealed and delivered in the presence of—
H. M. HEWITT.

COUNTY OF NEW YORK, *ss:*

On this 19th day of October, 1904, before me personally appeared Emil L. Boas, general manager of the Hamburg American Steamship Company, to me personally known and known to me to be the individual described in and who executed the foregoing instrument and duly acknowledged that he executed the same as general manager of the Hamburg American Steamship Company.

HARRY M. HEWITT,
[SEAL.] *Notary Public, N. Y. Co.*

Form 110–1, M-7, '04.

Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.

We will bond you.

Fidelity, judicial, burglary, contract.

STATE OF NEW YORK, *County of New York,* } ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Hamburg American Steamship Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Hamburg American Steamship Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as manager of said company; and that he is acquainted with George E. Hayes, and knows him to be attorney in fact of said company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars ($1,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 19th day of October, 1904.

[SEAL.]

VINCENT J. BOYLE,
Notary Public, New York County.
M. J. D.

Form 9.

No. 296.

STATE OF NEW YORK, } ss.:
County of New York, }

I, Thomas L. Hamilton, clerk of the said county and clerk of the supreme court of said State for said county, do certify, that I have compared the preceding with the original bond, with approval endorsed thereon, on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed filed Oct. 27th, 1904.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 5th day of Nov'r, 1904.

[Seal State of New York.]

THOS. L. HAMILTON, *Clerk.*

[Endorsed:] G. New York supreme court, appellate division, first department. Minnie Grube, as adm'x &c. plaintiff in error, against The Hamburg American Steamship Company, defendant in error. Bond on writ of error. Approved Oct. 20, 1904. R. W. Peckham asso. jus. Sup. Ct. U. S.

[Endorsed:] File No. 19,511 Supreme Court U. S. October term, 1904 Term No. 411 The Hamburg American Steamship Co. P. E. *vs.* Minnie Grube as adm'x &c. Writ of error bond. Filed Nov. 7, 1894.

Supreme Court of the United States, October Term, 1904.

THE HAMBURG AMERICAN STEAMSHIP COMPANY, Plaintiff in Error, *against* MINNIE GRUBE, as Administratrix, &c., Defendant in Error. } Assignment of Error.

Afterwards, to-wit, in this same term, before the justices of the Supreme Court at the Capitol in the city of Washington, comes the said, The Hamburg American Steamship Company, by Everett P. Wheeler, its attorney, and says that in the record and proceedings aforesaid there is manifest error in every one of the following rulings and decisions, to-wit:

First. The supreme court of the State of New York erred in deciding that under the statute of the United States approved June 28th, 1834, confirming and approving the agreement as to bounda-

ries between the State of New York and the State of New Jersey, which agreement is referred to in said act of Congress, the jurisdiction of the State of New Jersey extends to a line parallel with the coast thereof and distant one marine league from such coast line; whereas under the said statute of the United States and the agreement as to boundaries therein mentioned between the State of New York and the State of New Jersey, the boundary of the State of New Jersey and the jurisdiction of said State extends only to the main sea,—that is to say, low water mark along its exterior coast line and the line drawn from headland to headland across the entrance of the bay of New York.

Second. The said supreme court of the State of New York erred in denying the claim made upon the trial of this cause as aforesaid, to-wit, that under the said statute of the United States it was free in navigating the main sea to the eastward of the exterior coast line of the State of New Jersey from the jurisdiction of said State and from the operation of any law of said State of New Jersey giving right of action for injuries causing death.

Third. The said supreme court of the State of New York also erred in deciding that the United States of America had not acquired exclusive jurisdiction and legislation in all cases whatsoever over the peninsula of Sandy Hook and the littoral waters of the main sea to the eastward of that peninsula by virtue of section 8, article 1 of the Constitution of the United States and of the purchase by the United States of America of the said Sandy Hook peninsula and the appurtenances thereto and the waters necessary to the use thereof, pursuant to the authority conferred by the act of Congress of the United States, passed March 26, 1804, and of other acts of Congress authorizing said purchase, and of the cession by the State of New Jersey to the United States of America contained in the statute of said last mentioned State passed March 12, 1846.

Fourth. The said supreme court of the State of New York erred in denying the right claimed by the plaintiff in error by reason of the said purchase by the United States of the Sandy Hook peninsula and the appurtenances thereto and the waters necessary to the use thereof, and the cession to the United States by the State of New Jersey of jurisdiction over the same, and the long continued use by the United States of that peninsula and of the main sea to the eastward of it for military purposes, and by virtue of the said section of the Constitution of the United States and the said acts of Congress before mentioned, to be free in navigating the main sea to the eastward of the peninsula from the operation of any law of the State of New Jersey giving right of action for injuries causing death.

Fifth. The said supreme court of the State of New York erred in denying the claim of the defendant that the main sea to the eastward of the said Sandy Hook peninsula within a distance of three miles from the main shore is subject only to the jurisdiction of the United States, and therefore, as it appeared by uncontradicted evidence that the collision between the steamship "Alene" and the

pilot schooner James Gordon Bennett to recover damages for which this suit is brought, occurred on the main sea to the eastward of this peninsula a distance of more than one mile from low water mark upon the easterly side thereof, the plaintiff in error was entitled to have the court direct a verdict in its favor and its exception to the denial by the court of the motion to direct such verdict was well taken.

Sixth. The supreme court of the State of New York erred in denying the motion stated in said record to direct a verdict for the plaintiff in error upon the grounds therein stated, and the exception taken to such denial was well taken.

Seventh. That by the record aforesaid it appears that the judg ment aforesaid given was given for the said Minnie Grube, as administratrix, &c., against the said Hamburg American Steamship Company. Whereas, by the law of the land the said judgment ought to have been given for the said Hamburg American Steamship Company against the said Minnie Grube, as administratrix, &c., and the said Hamburg American Steamship Company prays the judgment aforesaid may be reversed, annulled and held for nothing, and that it may be restored to all things which it has lost by occasion of the said judgment.

EVERETT P. WHEELER,
Of Counsel for Plaintiff in Error.

[Endorsed:] U. S. Supreme Court, October term, 1904 The Hamburg American Steamship Company, pl'ff in error, against Minnie Grube, as administratrix &c. def't in error Assignment of errors Wheeler, Cortis & Haight, att'ys for pl'ff in error 21 State street, New York city, N. Y.

[Endorsed:] File No. 19511. Supreme Court U. S. October term, 1904 Term No. 411 The Hamburg American S. S. Co. P. E. *vs.* Minnie Grube adm'x Assignment of errors Filed Nov. 22, 1904.

Endorsed on cover: File No. 19,511. New York supreme court. Term No. 411. The Hamburg American Steamship Company, plaintiff in error, *vs.* Minnie Grube, as administratrix of John Grube, deceased. Filed November 1st, 1904. File No. 19,511.

FILE COPY.

FILED
JAN 10 1905

Supreme Court of the United States,

OCTOBER TERM 1904.

No. 411.

THE HAMBURG AMERICAN STEAMSHIP COMPANY,
Plaintiff in Error.

vs.

MINNIE GRUBE, as Administratrix of JOHN GRUBE, deceased,
Defendant in Error.

Brief for Plaintiff in Error on Motion to Dismiss or Affirm.

EVERETT P. WHEELER,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States,

October Term, 1904, No. 411.

The Hamburg-American Steamship Company,
Plaintiff in Error,

vs.

Minnie Grube, as Administratrix, &c.,
Defendant in Error.

Brief for Plaintiff in Error on motion to dismiss or affirm.

STATEMENT.

The action in this case was brought in the New York Supreme Court by Minnie Grube, as administratrix of John Grube, against the Hamburg-American Steamship Company, to recover damages for the death of her husband, caused by a collision between the pilot-boat "James Gordon Bennett" and defendant's Steamship "Alene," August 17, 1901. The complaint alleges (p. 5, fol. 15) that the collision occurred "in the vicinity of the Scotland Light-ship and of the high seas,"

and that by the laws of the State of New Jersey, within whose territory and waters such collision occurred, a cause of action for damages, resulting from such death, was given to the administratrix of the deceased (p. 6, fol. 17). These allegations are denied by the answer (p. 8, fo. 24; p. 9, fol. 25), which avers (p. 9, fol. 25) that said collision occurred upon the high seas, outside the waters of the State of New Jersey. On these issues the parties went to trial. The plaintiff had a verdict and judgment which was reduced in amount and as reduced, affirmed on appeal by the Appellate Division of the Supreme Court of New York (pp. 60 and 61).

Under the Code of Civil Procedure of New York (Section 191) an appeal "from a judgment of affirmance in an action to recover damages for injuries resulting in death" cannot be taken as of right to the Court of Appeals. It may, however, be allowed by the Appellate Division, and application to that court was therefore made to allow an appeal in this case, but it was denied (p. 64.) An appeal in such cases may also be "allowed by a judge of the Court of Appeals." An application made in this case to the Chief Judge was refused "on the ground that the questions involved in the record were Federal questions and should be reviewed by the Supreme Court of the United States." (Record p. 64) The memorandum of Chief Judge Cullen upon denying the application is at page 65 of the record. Upon petition showing these facts, and upon the record in the New York Supreme Court, a writ of error was allowed by Mr. Justice Peckham (p. 67). The defendant in error now moves to dismiss this writ of error for want

of jurisdiction or to affirm because the decision below was obviously right.

In cases like the present such a certificate as that embodied in the record and already referred to, when followed by the allowance of a writ of error by a Justice of this Court, ought to be an answer to such an application as this. If the Chief Judge of the highest court of the State and a Justice of this Court both certify that the question in the record is a Federal question, the ultimate decision of which should be made by this Court, it would seem that the plaintiff in error should be entitled to a hearing at the bar of this Court.

Nevertheless, for greater caution, plaintiff in error submits the following reply to the motion.

POINTS.

First.

The complaint bases the cause of action upon a statute of the State of New Jersey giving the right of action for injuries causing death. This statute was put in evidence on the trial (pp. 14 and 15). No other statutes giving such cause of action were offered in evidence.

In reference to the place of collision considerable evidence was taken, which is not stated in full for the reason, as stated in the bill of exceptions, that "the Appellate Division held on the first appeal herein that the evidence on this subject was conflicting and properly submitted to

the jury" (p. 18, fol. 52; p. 34, fol. 100; p. 50, fol. 149). It is stated in the bill of exceptions that witnesses for the plaintiff indicated "that the point marked 'Alene and wreckage' and initialed 'A. R. M.' was the point of collision." This is less than three nautical miles from the nearest shore (p. 14, fol. 40). (See chart following p. 56). The bill of exceptions also shows that the defendant claimed that the collision took place at the point subsequently marked by the wreck buoy placed by the United States Government over the wreck of the *Bennett* (p. 34, fol. 100). This buoy is also shown on the chart and is outside the three mile limit. The black line, running from the Scotland lightship through the whistling buoy to Rockaway Beach, is the line fixed by the Secretary of the Treasury as that outside of which the international rules for preventing collision apply, and inside of which the inland rules shall be in force (p. 16, fol. 46).

The black line shown on the chart, running through the beacon on Romer's Shoal, and thence running seaward, is the boundary between New York and New Jersey. This was placed on the chart by plaintiff's attorney, but defendant claimed "that this boundary extends only to the main sea" and not further than a point northeast of the Hook beacon, (p. 14, fol. 41). The Court will notice that exceptions were taken to the admission of the opinions of various navigators as to where the collision occurred, but no evidence on this subject is set out in the bill of exceptions except that necessary to show the materiality of these exceptions. These exceptions cannot be reviewed in this court. What ought to be reviewed is the ruling of the court upon the motion of the

defendant below to direct the verdict for the defendant. This contains the two claims of right and immunity under the Constitution and statutes of the United States and their authority, which were denied by the State Court and which are the basis of the jurisdiction of this court. The motion to direct a verdict was denied and the defendant below excepted (pp. 50-52).

The two claims of right were as follows:

I.—That under the statute of the United States approving and ratifying the agreement between the States of New York and New Jersey, in reference to boundary between them, which was approved June 28, 1834 (4 U. S., Stat. at large, 708) it was mutually agreed that the jurisdiction of the States of New York and New Jersey on the seaboard should extend only "to the main sea."

This is the language of the agreement (p. 47, fol. 141; p. 48, fol. 142). It is also the language of the statute in which the argument is set forth. It follows that the State of New Jersey after ~~1848~~ 1834 had no jurisdiction over the main sea east of its coast line, and that the subsequent statute of 1848, giving a right of action for injuries causing death did not apply, when the injury and death occurred on the sea.

The merits of this contention will be briefly considered under the Tenth Point.

II.—That the effect of the cession of the Sandy Hook Peninsula by the State of New Jersey to the United States, and the purchase of the fee of the said Peninsula by the United States and of the use by the United States for military purposes of the littoral waters to the east of that peninsula for

a distance of eight miles, was to vest in the United States, under Article I, Sec. 8 of the United States Constitution, jurisdiction over those littoral waters exclusive of the State of New Jersey.

The Act of Cession was approved March, 1846 (p. 35). The Act of New Jersey, giving the right of action for injuries causing death, was not passed until March 3, 1848 (p. 14, fol. 42). The claim of the plaintiff in error is that this latter act had no application to the littoral waters to the east of the Sandy Hook Peninsula, that the jurisdiction of the United States over these waters was exclusive and that therefore the defendant was exempt from the operation of the Act of New Jersey of 1848. The merits of this contention will also be briefly considered later.

It thus appears that the record shows (pp. 50-52), that a claim of right under statutes of the United States and under the authority of the United States was made in the court below, that this claim was denied and that the plaintiff in error excepted.

Workman v. Mayor, 192 U.S. 673.
Nat. Mut. Ins. Co. v. Chester, 193 U.S. 635.

Second.

The only answer that the defendant in error makes to our contention is, that the court cannot judicially know how the jury found upon the subject of the place of collision because there was evidence tending to show that the collision might have occurred more than three miles from the shore.

1. This contention overlooks an elementary rule of pleading. When a plaintiff alleges existence of a certain fact and the defendant traverses it, the verdict constitutes a finding for the party in whose favor the jury decides upon this issue. It is only the issues in a case that are tried by the jury.

"The jury are bound to give their verdict for the party, who, upon the proof, appears to them to have succeeded in establishing his side of the issue."

Stephens on Pleading, 84.

Here the plaintiff alleged that the collision occurred in the waters of New Jersey (p. 6, fol. 17). This the defendant denied (p. 9, fol. 25). The bill of exceptions expressly states that on the trial plaintiff below claimed that she should recover if the collision happened within three miles of the shore and defendant below claimed the contrary (p. 14, fol. 40; p. 34, fol. 100). On this record the finding of the jury for the plaintiff establishes that the collision took place within three miles of the shore—the place which the plaintiff contended to be within the waters of the State of New Jersey and which the court below has held as matter of law to be within such waters, and this Court should decide this question of law which is the only one now presented on this record. This question is distinctly presented by motion to direct a verdict (pp. 51, 52, fols. 153 and 154).

No claim whatever was made by defendant in error, upon the trial, that she could recover because the *Bennett* belonged to a New Jersey corporation, and was therefore, by a legal fiction, New Jersey territory.

2. If the jurisdiction of the sovereign of the shore extends as far as the range of cannon (see *post*, p. 19) the question whether the collision happened within three miles of the shore is immaterial. The claim of exemption is drawn so as to cover this point (p. 51).

3. The contention that it cannot be judicially known what the verdict was upon this point, because the charge is not given, is frivolous. The rule of pleading referred to is as old as trial by jury, and prevailed before the statute authorizing bills of exceptions was adopted. But to guard against any possible misconstruction the bill of exceptions states (p. 52, fol. 154), that the charge "did not cover any of the points mentioned in the motion to direct a verdict."

Counsel for defendant in error is well aware that in another case growing out of the collision between the *Alene* and the *Bennett*, it was held to be the law of the State of New York that no right of action exists in that state for injuries causing death, if the injuries were caused and the death took place upon the high seas, outside the jurisdiction of any state whose statutes give a right for action for injuries causing death. He quotes on his brief (p. 19), the decision on this subject.

Lennan *vs.* Hamburg-American Steamship Company, 73 Appellate Division (New York), 357.

This decision was followed in the case at bar and is assumed to be correct by the decision of the Court of Appeals upon the first appeal (pp. 54-56). On the first trial the claims of the respective parties as to the place where the collision happened, were the same as on the second trial. In reference to these claims the Court of Appeals says in this decision (p. 55, fol. 163):

"One of the questions litigated was that of jurisdiction which depended upon conflicting evidence and which, upon the record before us the unanimous affirmance below has concededly and conclusively resolved in favor of the plaintiff."

This judicial statement does not relate to the Federal question, but to the question of fact on plaintiff's claim.

When this case was before the Court of Appeals on the first appeal there was no evidence in the record upon the Federal questions which are now, first presented to this court. This evidence had not then been discovered by the defendant below.

4. Counsel for defendant in error states, at page 18 of his brief, that the writ of error allowed by Chief Judge Parker in the Lennan case was dismissed by this Court "because the claim of plaintiffs in error was not properly set up." It is surprising that counsel should make a statement in regard to so recent an occurrence which is obviously untrue and can only discredit the brief containing it. The memorandum handed down by this court upon that motion (194 U. S. 629) states that the writ of error was dismissed "for the want of jurisdiction." The cases cited show that this was on the ground that questions of fact as to the alleged negligence of defendant were involved which this Court could not review. In the Lennan case also the facts raising the Federal questions involved in this case had not been discovered when the issues were tried. The defendant below sought on that writ of error to review the rulings upon the merits of the case; that is to say, upon the applicability of the col-

lision rules to the facts of the case and the construction of these rules. But inasmuch as this Court held that there was so much conflicting evidence on these questions that it had no jurisdiction to review the decision in the State Court, the defendant below has omitted from the bill of exceptions in the present case the evidence upon this subject, except so much as was necessary to present certain other exceptions to evidence which the State Court has finally disposed of. The case now comes before this court solely upon the question whether, under various statutes of the United States bearing upon the subject and under the Constitution of the United States, its claim to be exempt from the authority of the statute of New Jersey, passed in 1848, giving a right of action for injuries causing death, upon which, as distinctly appears by the bill of exceptions, the plaintiff below rested her case, can be sustained.

In short counsel for plaintiff in error, having in vain endeavored to obtain a hearing in this Court upon the merits of this case, under the rules of navigation; now seeks to review the judgment upon the question not heretofore raised in this Court, of its right under the Constitution and laws of the United States to be free from the operation of the statute of New Jersey, upon which the right of action is sought to be sustained.

Third.

Defendant in error alleges as one ground for

the motion to affirm "that the writ of error herein was taken for delay only." This untrue and unwarranted statement counsel for the plaintiff in error contents himself with absolutely denying.

Fourth.

The questions presented on this record are on their face of such importance that they ought to be fully discussed at the bar of this court. They involve the construction of the Constitution of the United States and of Federal statutes which have never been judicially passed upon, and which are manifestly of national importance. If, notwithstanding the Act of Cession and the purchase of the fee of the peninsula by the United States, the State of New Jersey still has jurisdiction over the waters to the east of the Sandy Hook Peninsula, what is to hinder it from prohibiting officers of the United States from firing shot and shell over these waters? What is to hinder it from erecting an artificial island there, as the State of New York has done in New York Bay, and using this for state purposes.

It is believed that the Court will not consider these questions now, but will reserve them for further examination. Nevertheless, for greater caution, plaintiff in error submits the following argument on the merits:

Fifth.

It is plain upon the record that whether the collision occurred outside or inside the three-mile limit it took place on the ocean, and to the eastward of the Sandy Hook peninsula. Exclusive jurisdiction over these littoral waters is vested in the United States.

In support of this proposition defendant relies on the following:

United States Constitution, Art. 1, Sec. 8, gives Congress power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of Forts, Magazines, Arsenals, Dockyards and other needful buildings."

The Act of Congress of March 20th, 1794 (1 U. S. Stat. at L., 345), which is not mentioned in the brief for defendant in error, authorizes the fortification of the harbor of New York, under the direction of the President, and authorizes the President to receive from any State a cession of land for the purpose, or where such cessions shall not be made, to purchase such lands on behalf of the United States.

The Act of Congress of 1804 (2 U. S. Stat. at L., 294) directs the Secretary of the Treasury as soon as the fee of the soil should have vested in the United States to cause a beacon to be erected on the north point of Sandy Hook (p. 36, fol. 106).

A deed executed February 26th, 1806, conveys

to the United States the northern point of the Sandy Hook peninsula (pp. 36-38, fols. 106-115).

Another deed executed June 17th, 1817, conveys to the United States the land south of the first parcel and extending to the narrow neck of land at the southern end of the peninsula (pp. 39-46, fols. 115-137). The south boundary of the ceded peninsula is marked "Old United States Boundary" on the chart, and it was stipulated between the parties that this is the boundary mentioned in the Act of Cession (p. 46, fol. 138). The most casual inspection of the chart will show that the place of collision was within the littoral waters to the east of the ceded peninsula.

The Act of Congress of April 28th, 1828 (4 U. S. Stat., at L., 264), re-enacted in Section 1838, U. S. Rev. Stat. (which also is not mentioned in the brief for defendant in error), authorizes the President "to procure the assent of the Legislature of any State within which any purchase of land has been made for the erection of forts, magazines, arsenals, dock yards and other needful buildings, without such consent having been obtained."

Pursuant to this Act, the consent of the State of New Jersey to the purchases before mentioned, was obtained in 1846. The Act approved March 12th, 1846 (N. J. Laws of 1846, p. 124), ceded to the United States jurisdiction over the Sandy Hook Peninsula, which had thus been purchased (p. 35, fols. 103-105).

It was proved on the trial by the uncontradicted evidence of Major Birnie, that since 1878, the Government of the United States has used the Sandy Hook Peninsula for cannon practice, practically daily (pp. 48, 49, fols. 144-145), and that the firing has extended from the shore to the

northward and eastward of Scotland Lightship to a distance of eight miles.

Sixth.

The effect of the above statutes and deeds was to vest in the United States title in fee to the Sandy Hook Peninsula and exclusive jurisdiction over it.

1. The Constitution of the United States lays down three prerequisites to the exclusive jurisdiction conferred by the paragraph quoted above: There must be purchase by the Federal Government, consent by the State, and the purpose must be the erection of forts or other needful buildings.

United States *v.* Tucker, 122 Fed. Rep., 518.

These requisites were complied with.

(a.) The President, duly authorized by the Acts of Congress of 1794 and 1804 (*supra*), obtained a conveyance of the peninsula, which was made by the deeds above referred to. It was a "purchase", for, as the deeds recite, a money consideration was paid—$3,750 in the first case, and $20,000 in the second. Upon the delivery of these deeds the United States owned this land in fee.

(b.) The consent required by the Constitution was obtained in 1846 by the Act of New Jersey referred to above.

The fact that this consent was subsequent to the purchase is immaterial as shown (if authority for such a proposition be needed), by the case of

United States *v.* Tucker, 122 Fed. Rep., 518.

The Court there points out (p. 522) that although the Act of August 16, 1892, was not passed until some years after the United States had acquired the land described in the indictment, still the consent of the State to the purchase was thereby given. The New Jersey Act of 1846 expressly recognizes the fact that the land was "owned by the United States." It expressly enacts what the Federal Constitution would accomplish independently of it, that "the jurisdiction in and over all that portion of Sandy Hook * * * owned by the United States * * * be and the same is hereby ceded to the said United States, for military purposes * * * "

(c) It cannot be disputed that this purchase was made and consented to for the purposes contemplated by the Federal Constitution or that the tract in question has always been and is now used for those purposes. This fact is recognized by the Act of Cession itself. Those purposes are expressly set forth in the Acts of Congress, above cited, authorizing the purchase and the acceptance of the cession. Major Birnie's testimony sets the matter beyond all question.

2. It remains to consider the effect of such purchase and consent under the United States Constitution. The leading case on this subject is Ft. Leavenworth, &c. R. R. Co. *v.* Lowe, 114 U. S., 525. In that case it appeared that the Constitutional requirements had not been complied with, for the United States acquired title to the Fort Leavenworth military reservation by purchase before, not after, the admission of Kansas to the Union. After Kansas became a state the United States continued to own this tract of land,

but the Act of Congress admitting the state made no reservation of the jurisdiction of the United States over it, and this was therefore held to have been ceded to Kansas. An Act of the Legislature of Kansas was subsequently obtained, ceding to the United States jurisdiction over the reservation; but it was held that inasmuch as this Act was the sole source of the authority of Congress over the tract in question, the State could limit the grant, and that its reservation of the power to tax a railroad passing through it, was, therefore, valid. The Court, however, was unanimous in saying that wherever land is purchased by the United States within the limits of an existing State, and with the consent of the Legislature, the jurisdiction of Congress, under the Constitution, is exclusive. The case contains a full discussion of the entire question. It sums up the constitutional doctrine as follows (p. 532 *et seq.*):

"When the title is acquired by purchase by consent of the Legislatures of the States, the Federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of exclusive legislation in all cases whatsoever. Broader or clearer language could not be used to exclude all other authority than that of Congress, and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals and of the Attorneys General.

* * * * *

"When, therefore, a purchase of land for any of these purposes is made by the national government, and the State has given its consent to the purchase, the land so purchased by the very

terms of the Constitution *ipso facto*, falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the State Legislature is by the very terms of the Constitution by which all the States are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place."

S. P. Story, Constit., Sec., 1227.
In re Ladd, 74 Fed. Rep., 31.
United States *v.* Tucker, 122 Fed. Rep., 518.
Commonwealth *v.* Clary, 8 Mass., 72.
United States *v.* King, 34 Fed., 302.

As the States have no longer legislative power over these military tracts, so their inhabitants have none of the rights of citizens of the States to which they originally belonged.

Sinks *v.* Reese, 19 Ohio St., 306.
Opinion of the Justices, 1 Metcalf (Mass.), 580.
Commonwealth *v.* Clary, 8 Mass., 72.
6 Opinions U. S. Attys. General, 577.

It is hardly necessary to dwell at length on the practical reasons which underlie the constitutional provision quoted above, and which have led the Courts to sustain the Federal jurisdiction as exclusive whenever possible. In the apportionment of powers between the State and Federal governments, the latter is to exercise those of peculiarly national character, prominent among which is that of making war. By the Constitution, Congress is given power to "declare war" (Art.

I, Sec. 8, Par. 15); "to raise and support armies" (Art. I, Sec. 8, Par. 16); the States are forbidden "without the consent of Congress" to "keep troops or ships of war in time of peace," or to "engage in war, unless actually invaded, or in such imminent danger as will not admit of delay" (Art. I, Sec. 10, Par. 3). The design of the Constitution was to leave the Federal Government free in its conduct of military matters, untrammelled by State interference, and accordingly it provided a means for the acquisition by the Federal Government of the land necessary for military purposes, and then put that land beyond the reach of restrictive State legislation by giving to Congress the power "to exercise exclusive legislation in all cases whatsoever." Thus the territory used for military purposes is given precisely the same protection from State interference as that accorded to the seat of Federal Government, the District of Columbia, where it is obvious that no interference by the States could be tolerated. In the Fort Leavenworth case the practical necessity of these provisions is shown by a quotation from the Federalist:

"The public money expended on such places and the public property deposited in them require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it."

3. The act of New Jersey in the case at bar is perfectly definite in its terms. It is an absolute cession of "the jurisdiction" over Sandy Hook. Such an Act is inconsistent with any legislative power remaining in the State. The State had

jurisdiction; it ceded it; how can it be claimed that jurisdiction still remains in the State? Such cessions, even when outside the constitutional provision, are in general treated by the courts as analogous to the purchases under the Constitution. The practical reasons in favor of an exclusive federal jurisdiction are equally applicable, and the cases accord to the United States the same jurisdiction over places thus ceded by States as over those purchased by the consent of a State, in so far as the particular act of cession does not expressly restrict it.

United States *v.* Carter, 84 Fed. Rep., 622.

Seventh.

The jurisdiction over Sandy Hook acquired by the United States included the littoral waters lying to the eastward.

That littoral waters within three miles of a maritime frontier are subject to the jurisdiction of the sovereign of the shore, is now too well settled to admit of doubt.

Wheaton thus states the rule in his International Law, Sec. 177:

"The general usage of nations superadds to this extent of territorial jurisdiction the distance of a marine league, or as far as cannon shot will reach from the shore along all the coasts of the State. Within these limits its rights of property and territorial jurisdiction are absolute and exclude those of every other nation."

Wheaton uses the word "State" here in the sense of nation. He is not dealing with the States of the American Union, but with the States composing the great family of nations.

R. H. Dana's note (105) to the same section quotes numerous writers who all recognize the jurisdiction as "the power of regular and effective instruments of war." He quotes Bynkershoeck: "*Terrae potestas finitur ubi finitur armorum vis.*"

Authorities learned in international law affirm that the effect of the increase in the range of projectiles is to extend the exclusive jurisdiction of the sovereign of the shore.

Pomeroy on Int. Law, § 144.
Hautefeuille, Droits des Nations Neutres, vol. 1, pp. 53, 54.

No doubt the jurisdiction of New Jersey during the interval between independence in 1776 and the adoption of the Federal Constitution, extended to the three-mile limit. But the Federal Constitution authorizes Congress to regulate commerce between the States and with foreign nations (Art. 1, Sec. 8); to define and punish piracies and felonies committed on the high seas (Art. 1, Sec. 8) and extends the judicial power of the Federal Courts "to all cases of admiralty and maritime jurisdiction" (Art. III, Sec. 2). Under this grant of power, Congress had jurisdiction over these littoral waters. This power was exercised by Congress in adopting rules for the navigation of vessels upon these waters (p. 15), which are in evidence, and which were originally adopted April 29th, 1864 (Vol. 13 U. S. Stat. at L., p. 58). They were subsequently codified in U. S. Rev.

Stat., Sec. 4233, and have since been adopted in amended form by the act approved June 7, 1897 (p. 15, fol. 43).

In addition to this, Congress as long ago as 1790, passed Acts for the punishment of crimes committed "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States." These Acts are codified in Chap. 3, Title 70, U. S. Rev. Stat., Secs. 5339, to 5391. Sect. 5391 provides especially for offenses "committed in any place which has been, or may hereafter be ceded to, and under the jurisdiction of, the United States."

Some of these sections apply only to places within the exclusive jurisdiction of the United States; others apply to places over which the United States exercises jurisdiction concurrent with that of a particular State.

This then was the situation in the case at bar:

The United States Government had bought the fee of the peninsula at the entrance to the most important harbor within the United States. It had already jurisdiction concurrent with the State of New Jersey over the sea to the eastward of this point. It was buying the peninsula for military purposes, in order to erect batteries which should control the sea to the eastward. Jurisdiction, exclusive of the State of New Jersey, over the littoral waters would be essential to the value of the grant.

The New Jersey Act, which, as shown above, gave to the United States exclusive jurisdiction over the peninsula of Sandy Hook passed the same jurisdiction over the littoral waters.

Ex parte Tatem, 23 Fed. Cas., 708; S. C., Hughes, 588.

1. This result is merely an application of the familiar rule of international law quoted above—that the jurisdiction of a sovereign extends over the littoral waters. Its application to a fortified strip of land ceded for military purposes is, however, peculiarly appropriate because the three-mile limit had its origin in the control given over the littoral waters by fortifications on the shore. It makes little difference whether we consider that the jurisdiction over littoral waters of Sandy Hook passed as part of or as a necessary incident to the cession of the peninsula itself. Nations have jurisdiction of littoral waters because they are sovereign over the shore. New Jersey originally included the waters off Sandy Hook because New Jersey included Sandy Hook itself. When Sandy Hook is ceded to a new sovereign, that sovereign by parity of reasoning controls those waters. The incidental jurisdiction over the waters cannot remain when the principal on which it depended is gone.

Had this cession been made by the United States and New Jersey to a foreign government, it would clearly carry with it the littoral waters. When Great Britain recognized the independence of the United States, she ceded her sovereignty over the waters within three miles of the coast. The cessions to the United States of Alaska and of Florida included their littoral waters. This is the usual effect of cession to a new sovereign. That the sovereignty of the United States is absolute within its sphere is too well settled to require argument. This sphere, by the express mandate of the Constitution, includes the power of exclusive legislation over tracts of land, purchased for military purposes with the consent

of the State. Its dominion over them is therefore that of an absolute sovereign, and as such it controls the littoral waters as any other sovereign would. There is nothing in our theory of government to prevent the application of the usual rule of international law.

2. Not only does the general rule of international law favor the defendant's contention, but the special circumstances under which these military tracts are created lend it peculiar force. As has been indicated above, the object of the constitutional provision for Federal military tracts was to centralize the means of national defense and to unify the legislation which might affect them. The grant to the United States of exclusive legislative power is one to be broadly construed for the realization of its intended objects. A construction which tends in any degree to obstruct those objects or to diminish the freedom of the Federal Government is to be avoided. The objects to be attained were avowedly two—the protection of the harbor of New York (1 U. S. Stat. at L., 345) and the erection of a lighthouse on Sandy Hook (2 U. S. Stat. at L., 249). Both of these objects are "public purposes" within the meaning of the New Jersey act of cession and both are included in the words of the Constitution "for the erection of forts * * * and other needful buildings." Realization of each of these objects requires control of the water. The United States take Sandy Hook as Great Britain did Gibraltar, to use it as a strategic point. Constant target practice is carried on over the waters to the eastward, as is shown by the uncontradicted evidence of Major Birnie. He testifies that the range for artillery

practice extends over these waters to a distance of about eight miles to the eastward; that the Scotland Lightship is a little to the east or southeast of the firing point, and that the firing continues over a range of about 45° from that toward the east and north (pp. 48, 49, fols. 144, 145, 146). Undisputed dominion of the region surrounding such a point is as clearly necessary to its strategic value in the case of Sandy Hook as in that of Gibraltar. Could it be tolerated for a minute that New Jersey should regulate the waters or fisheries off Sandy Hook so as to impede the Government target practice. Or that it should allow the construction of artificial islands or buildings off the shore which would hamper military operations and obstruct the light from the lighthouse? Or that it should enact a law throwing the burden of proving absence of negligence on the United States in cases where damage was caused by the target practice? Can it be said that when a nation acquires land for *military purposes,* that nation cannot exercise control over the waters adjoining that land? Will the Court hold that the long-continued use of the waters for target practice is a violation of New Jersey's sovereignty?

There is a manifest absurdity in claiming that the ocean waters to the east of Sandy Hook are the domain of a sovereign different from that of the land. It can not be that New Jersey can legislate for the water but not for the land; that while the inhabitants of Sandy Hook are not citizens of New Jersey and voters there, those of a lightship moored off the shore are. The practical inconvenience of such results is analogous to that which gave rise to the presumption that conveyances between private parties, bounding on a road

or stream, pass to the centre—namely, that the existence of little detached strips or gores claimed by a person other than the abutting owner would be a source of endless confusion and complication of title.

Jurisdiction over these waters is vital to the United States; it is a matter of indifference to New Jersey. The waters do not wash her shores. She is not affected by what happens on them. How can it be said that New Jersey intended to reserve a jurisdiction so useless to her, so vital to the United States?

3. To realize the particular object of this cession, control of the waters is peculiarly necessary. It would be difficult to put a case which better illustrates the wisdom of the doctrine that "when the use of a thing is granted, everything is granted by which the grantee may have and enjoy the same."

Kent's Comm., 467, note g.
United States *v.* Appleton, 1 Sumner, 492.

In this case Judge Story held that the right to swing a door over a court adjoining the building conveyed to the defendant, passed as incident to the grant. At p. 500, he says:

"It is implied from the language of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner and with the same beneficial rights as were then in use and belonged to the defendant."

And again at p. 503:

"Whatever are proper incidents and appurtenances of the grant will pass without the word 'appurtenances' by mere operation of law."

To the same effect are:

Potter *v.* Boyce, 73 App. Div., 383; aff. 176 N. Y., 551.
Huttemeier *v.* Albro, 18 N. Y., 48;
Richardson *v.* Bigelow, 15 Gray (Mass.), 154.

In Voorhees *v.* Burchard, 55 N. Y., 98, the rule was stated that "some things pass by a conveyance of lands as incidents appendant and appurtenant thereto, though not named therein." And the court remarked that "a deed purporting to convey by metes and bounds, may be legally construed, in the light of surrounding circumstances, to include also privileges annexed to, or connected with the main subject of the grant."

To the same effect is Simmons *v.* Cloonan, 81 N. Y., 557. In this case it was held that the incident need not be absolutely essential to the use of the parcel of land specifically mentioned in the deed; it is enough if full enjoyment of the property could not be had without it.

This rule is applied in cases similar to that of the case at bar.

Ex parte Tatem, 23 Fed. Cas., 708; S. C., 1 Hughes, 588.

This case involved the jurisdiction of the United States over a crime committed on board a vessel lying at a wharf in the United States Navy Yard near Portsmouth, Va. By certain acts of the Virginia Assembly and by certain deeds, exclusive jurisdiction over "the public lands known by the name of Gosport, and certain lands immediately opposite "had been ceded to the United States "for the purpose of a navy yard." It was con-

tended that the jurisdiction ceded did not include the littoral waters. The court held the contrary, saying:

"By navy yard is meant not merely the land on which the Government does work connected with ships of the navy, but the waters contiguous necessary to float the vessels of the navy while at the navy yard."

5. Defendant in error relies upon the decision of Middleton *v.* La Compagnie Generale Transatlantique, 100 Fed. Rep., 866. In this case, however, the injury happened not in the waters to the east of the peninsula, forming part of the main sea, but in the inner bay. The Court expressly makes this distinction. Judge Lacombe says (p. 867):

"We have then a case which deals, not with the strip of ocean which extends seaward from a maritime frontier, but with waters wholly inland, where ownership and jurisdiction are distributed between the abutting territory according to the domestic laws of the country within which such waters lie. Such distribution in the case at bar, may be ascertained, not by any discussion of ancient charters, or by any extended analysis of the principles governing riparian boundaries. It has been settled expressly and positively by the conjoint action of the only three political powers which could by any possibility be held entitled to exercise jurisdiction over such locality. The States of New York and New Jersey and the United States of America, have legislated in harmony."

The learned judge then cites the acts before quoted. He proceeds also to call "attention to the circumstances that it nowhere appears in the record that the United States purchased Sandy

Hook," that the accident happened upon waters, which were within the limits of the State, conceded to be so by neighboring State, and by the United States, before the act of cession, and that the act, therefore, does not purport to transfer the locality in question.

In this same case Judge Lacombe says (p. 867):

"Certainly it may be expected that every maritime nation will insist upon the control of its own coast waters, to the extent to which it is able to dominate them from the shore."

Eighth.

The effect of the transfer of jurisdiction over Sandy Hook and the adjacent waters was to deprive the State of New Jersey of power to legislate for that region, and hence the Death Act of New Jersey, which was passed subsequent to the cession can have no operation here.

1. Before the act of cession, Sandy Hook was subject to the common and statute law of the State of New Jersey. We do not contend that the cession operated *ipso facto* to abrogate this body of law. On the contrary, it is well recognized that change of sovereignty over territory does not *ipso facto* work a general change of the law then existing.

Halleck Int. Law, chap. 34, sec. 14.
American Ins. Co. *v.* Canter, 1 Peters, 511, at 542.
Commonwealth *v.* Chapman, 13 Metcalf (Mass.), 68.
Chappell v. Jardine, 51 Conn., 64.

The same doctrine is applied to cessions by particular States to the United States for military purposes.

Chicago and Pacific Ry. Co. *v.* McGlinn, 114 U. S., 542; 29 L. Ed., 270.
Barrett *v.* Palmer, 135 N. Y., 336.
Madden *v.* Arnold, 22 App. Div., 240.

2. The act of cession was in 1846. The New Jersey statute giving a right of action for death by wrongful act was approved in 1848. This act is no more operative upon the Sandy Hook peninsula than is the legislation of the State of Maryland enacted after the cession of the District of Columbia operative in that District.

The effect of such a cession is to subject the territory ceded, to the United States as its sovereign and to sever all further political relation with the State of which it was formerly a part.

Madden *v.* Arnold, 22 App. Div., 240.

Thenceforth all legislation must be by the new sovereign, the United States, and New Jersey is utterly without power to enact new laws for this territory.

In re Ladd, 74 Fed. Rep., 31.
Mitchell *v.* Tibbets, 17 Pick. (Mass.), 298.
Commonwealth *v.* Clary, 8 Mass., 72.

In the Ladd case a tract of land was occupied by the United States for military purposes and had been ceded by the State of Nebraska. Sub-

sequently to this cession, an act of that State forbade the sale of liquor without a license and under it the officer in charge of the post exchange at this military reservation was prosecuted. It was held, upon *habeas corpus* from a Federal Court, that the act of Nebraska was inoperative upon the tract of land in question. The Court says:

"No extended argument is needed to show that it was wholly without the power of the State of Nebraska to thus limit the completed cession of jurisdiction created by the act of March, 1887. When the latter act took effect the legislative jurisdiction of the state over the reservation was wholly ceded to the United States, and until the exclusive jurisdiction thus acquired by the United States is terminated, either by the United States ceasing to own and occupy the reservation, or by the United States retroceding its exclusive jurisdiction to the State, the latter is without legislative power over the reservation."

In Mitchell *v.* Tibbetts, *supra,* land had been purchased by the United States with the consent of the State of Massachusetts for the Charlestown navy yard. The act of cession was in 1800. In 1822 the State legislature passed an act requiring vessels transporting stone within the state to comply with certain formalities. The act was held inapplicable to a vessel engaged in carrying stone between a port in the State of Maine and the Navy Yard. "* * * we are of opinion," says the court, "that the law of Massachusetts on which this action is founded did not extend to and operate within that territory, and that consequently this vessel was not employed within this Commonwealth within the meaning and construction of the act."

So in Contzen *v.* United States, 179 U. S., 191, it was held that after the annexation of Texas to the United States, the laws of the latter as to naturalization were in force in Texas, and not those of that Republic.

Ninth.

The New Jersey Act of cession contains nothing at variance with the propositions advanced above.

1. It is true that the act of cession provides that "the jurisdiction ceded * * * shall not prevent the execution on the said tract of land of any process, civil or criminal, under the authority of this state, except so far forth as such process may affect any of the real or personal property of the United States of America within the said tract."

Provisions similar to this have frequently been the subject of judicial consideration. They are customary, if not universal, in cessions by states to the Federal Government, and are held not to infringe the power to "exercise exclusive legislation" conferred by the Constitution. In the leading Ft. Leavenworth case, this Court says (p. 533, L. ed., p. 267):

"The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice."

To the same effect are:

United States *v.* Cornell, 2 Mason, 60; S. C., 25 Fed. Cas., 646.
United States *v.* Meagher, 37 Fed., 875.
Lasher *v.* State, 30 Tex. App., 387.

2. It is also true that the act of cession provides that "the jurisdiction ceded" shall not "prevent the operation of the public laws of this state within the bounds of the said tract, so far as the same may not be incompatible with the full use and enjoyment of the said premises by the United States for the purposes above specified." This is a statutory statement of the principle above stated —that change of sovereignty does not work a change of law. The provision refers to the public laws in force at the time of cession and is not to be construed as embracing any future legislation which the State of New Jersey may enact.

United States *v.* Hammond, 1 Cranch C. C., 15; S. C., 26 Fed. Cas., 96.

This case raised the same question and came up under the same paragraph of the Constitution as the case at bar. It was an indictment for theft committed in that part of the District of Columbia which was ceded to the United States by Virginia. The Virginia Assembly had passed an act making a cession of the territory in it the following clause:

"Provided that the jurisdiction of the laws of this commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine

until Congress, having accepted the said cession, shall by law provide for the government thereof under their jurisdiction, in manner provided by the article of the Constitution before recited."

It was contended that this clause prevented the federal jurisdiction from attaching until Congress should enact the legislation indicated. The Court, however, held that the only effect of the clause was to stipulate "that the laws of Virginia, as they should exist at the time of the actual transfer of the jurisdiction should remain in force as law until Congress should otherwise provide, under their jurisdiction," that jurisdiction passed to the United States in spite of the clause quoted, and that the ceded territory was subject only to the laws of Virginia existing at the time of the cession.

3. To demonstrate the correctness of this conclusion, it is necessary only to look at the results which a contrary construction would involve.

The Federal Constitution provides that purchase by the United States for military purposes with the consent of the State shall give Congress the power of exclusive legislation. Therefore if a State attempts to give the consent required by the Constitution and at the same time to limit by provisions inconsistent with the exclusive legislative power of Congress, one of two results must follow. Either the limiting provisions are void as conflicting with the Constitution, or else the whole consent is totally invalid under the Constitution because not unrestricted as the Constitution requires. The latter result would seem forbidden by the maxim which requires construction *ut res magis valeat quam pereat,* and by the further rule

that a reservation in a deed, repugnant to the grant, is void.

It may, however, be contended by the plaintiff that even though a construction of this provision so as to allow legislation by the State of New Jersey would invalidate the act as a consent under the Constitution, still the act may operate as a qualified cession independent of the Constitution. That such cessions may be made is undoubted. But even under this view it is impossible to construe the clause in question as permitting legislation by New Jersey subsequent to the cession. That construction takes away with one hand what has just been given with the other. It is meaningless to cede to the United States "jurisdiction in and over" Sandy Hook, but to provide that New Jersey shall continue to have jurisdiction to enact legislation for that peninsula. This contradiction is like that which the court in the Hammond case points out:

"Then the Legislature would in effect say that we cede to the Congress and government, of the United States a certain district, the full and absolute jurisdiction over which shall vest in Congress as soon as the said district shall become the seat of government of the United States; provided, nevertheless, that the said jurisdiction shall not vest on the happening of that event, but on a subsequent act which is to be done by Congress under and by virtue of the jurisdiction which we transfer. The absurdity of this construction is evident."

The power of legislation is a function of sovereignty; jurisdicion also belongs to sovereignty. It is impossible to say that New Jersey has the former and the United States the latter. The

Court will not adopt a construction which renders the act of cession inconsistent with itself.

"No repugnancy or absurdity shall be presumed especially in a statute, if the words will bear such a construction as to avoid it. All instruments and statutes shall be so construed *ut res magis valeat quam pereat.*"

U. S. *v.* Hammond, *supra,* p. 17.

Moreover, if these broad rights of sovereignty over Sandy Hook are still New Jersey's, why was it necessary to insert a special proviso that New Jersey could still serve her process therein? All these difficulties and inconsistencies are avoided if the clause under discussion be given its natural meaning—a statement of the well-recognized principle of international law that territory ceded by one sovereign to another carries with it the existing body of law as of the time of cession.

4. The proposition that the clause refers to the body of law existing at the time of cession is further sustained by the uniform rule in the construction of statutes, that descriptive matter therein must refer to things as they existed at the time of its passage.

In McConihay *v.* Wright, 121 U. S., 201, 205, it was held that the clause in the Judiciary Act of 1789, giving the Federal Courts equity jurisdiction in cases where there is no adequate remedy at law, referred to the remedy as it existed at the time the Act was passed; and that, therefore, the Federal Circuit Court in West Virginia would still retain equity jurisdiction, although an Act of that State had subsequently been passed, giving the Courts of Common Law jurisdiction in the same class of cases.

So in Morris Canal Co. *vs.* The State, 24 N. J., Law, 62, the charter of the Canal Company required it to build a bridge at its own expense "when the canal shall cross any road." The Court held this meant any road existing at the time the canal should be built, and did not apply to a road subsequently laid out.

This decision is especially to be regarded because it is a decision of the Supreme Court of the State of New Jersey, and it is a statute of that State that is now under construction.

S. P. Griswold *v.* Atlantic Dock Co., 21 Barb., 225.

Tenth.

Under the Act of Congress ratifying the boundary agreement between the States of New York and New Jersey, the boundary of the latter State extends only to the main sea,—that is to low water mark along the coast.

This proposition was one of the grounds upon which the defendant based its motion to direct a verdict, which was denied by the trial judge (pp. 50, 51, 52, fols. 150, 151, 154). The boundary between the two States was fixed in 1834 by an agreement between commissioners of the respective States (pp. 47, 48, fols. 139, 143).

"The boundary line between the two States of New York and New Jersey * * * shall be the middle of said river (the Hudson) of the Bay of New York of the water between Staten Island

and New Jersey, and of Raritan Bay *to the main sea.*"

This agreement was adopted by statutes of New York and New Jersey.

Chap. 2, Gen. Laws N. Y., Sec. 7, 1 Heydecker's Ed., 69.
3 Gen. Stats. of N. J., 3464.

This agreement was ratified by Congress June 28, 1834 (p. 47, fol. 139).

4 U. S. Stats. at L., 708.

It was invalid until so ratified.

Constitution United States, Article I, Section 10.

The effect of this statute of the United States was to vest in the United States jurisdiction over the littoral waters to the south and east of the coast line of New York and New Jersey.

1. The statute and the agreement provide that this line shall run "to the main sea" (p. 47, fol. 141; p. 48, fol. 142). These are technical words and it is well settled that when the phrase "main sea" or its equivalent "high seas," is used, it means the ocean from low water mark.

To use the language of WOOD, V. C., in

General Iron Screw Co. *v.* Schurmans, 1 J. & H., 180;

"There can be no possible doubt that the water below low water mark is part of the high seas."

Statutes of the local authorities do not have any force within this three-mile limit unless expressly so stated in the statute. This was so held by the Privy Council in

The *Saxonia*, 1 Lushington's Admiralty Rep., 410.

In the leading case of The *Franconia*, Regina *v.* Keyn, L. R., 2 Exchec. Div., 63, it was settled after the fullest consideration, that the British criminal law did not, in the absence of an Act of Parliament, extend to a foreigner committing a criminal act in the British Channel within three miles of the coast of England.

At page 230 Mr. Justice LUSH says:

"All beyond low water mark was part of the high seas."

S. P.: U. S. *v.* Kessler, Baldwin Rep., 15, 35.

It is therefore obvious that the statutes of New York and New Jersey fix the line of jurisdiction of these two States quite irrespective of the three-mile limit, and do not extend it to that part of the high seas within this limit. The consideration of that limit is therefore unimportant. These States have left the jurisdiction of the littoral waters forming part of the high seas to the United States Government, and there it properly belongs.

2. The Appellate Division in Lennan *v.* Hamburg-American S. S. Co., 73 App. Div. (N. Y.), 357, treats Regina *v.* Keyn, as overruled. But the learned Court failed to observe that however the judges in that case differed as to whether a general Act of Parliament would apply to a crime committed within the three-mile limit, they all agreed that these littoral waters were part of the "high seas."

Mr. Justice LUSH has already been quoted. At p. 151, KELLY, C. B., uses similar language:

"The high seas, that is to say, all the whole seas of the world below low water mark."

All the text writers support the same proposition, and Blackstone's language proves that the words "main sea" were used as synonymous with the words "high sea."

In his Commentaries, Vol. I, p. 110, he says:

"*The main or high seas* are part of the realm of England, for thereon our Courts of Admiralty have jurisdiction as will be shown hereafter, but they are not subject to the common law. This *main sea begins at the low water mark.*"

To the same effect are Bouvier, Law Dict., title "High Seas."

Coulsford and Forbes on Waters, 11.
United States *v.* Ross, 1 Gallison, 624.

3. The agreement ratified by Congress shows on its face that it was drawn by eminent lawyers, one of whom Benjamin F. Butler, soon after became Attorney General of the United States, and had been one of the revisers of the statute law of the State of New York. Another, Lucius Q. C. Elmer, was the author of the Digest of the Laws of New Jersey. Both of these distinguished men were familiar with legal terms. If it had been their intention in drawing the agreement between the States to maintain the old jurisdiction of their respective States over the littoral waters within the three-mile limit, they certainly would have said so. The Legislatures of the two States and Congress certainly would have used language apt for this purpose.

When at a later date the treaty was negotiated

which gave the United States jurisdiction over the Panama zone, it was expressed that jurisdiction should extend to a line distant "three marine miles from mean low water mark."

Article II of the Treaty, U. S., Stat. at Large, 1903-04, p. 149 of Treaties.

Eleventh.

Defendant in error claims under the second point of the brief that she was in any case entitled to recover because the schooner upon which the deceased was steward was owned by a corporation incorporated under the laws of New Jersey, that this made it New Jersey territory for the purposes of this action, and that the decision below might have rested upon this ground. As already shown, however, the decision below did not rest upon this ground. The complaint, which puts the jurisdiction upon a different basis. The bill of exceptions shows that no such claim was made upon the trial. The recorded opinion of the Supreme Court of New Jersey already referred to, shows that a similar claim made in another case was overruled.

In the case at bar the record shows that the claim made under the Federal statute was denied by the State Court, and that the decision in favor of defendant in error proceeded solely upon this ground.

The question thus mooted by plaintiff in error is one of great importance and one that the plaintiff in error would be glad to have considered in this

court. The counsel who makes this brief had the honor of presenting it to this court in a brief filed in "The Montana," 129 U. S. 397 (reported *sub. nom.* Liverpool and G. W. S. Co. *v.* Phenix Ins. Co).

All the steamship companies there joined in the contention that in actions of tort the law of the flag controls. But inasmuch as this court has held, not only in that but in many subsequent cases, that the law of the flag does not govern the decision in actions of tort, it seems hardly worth while to argue this question now.

See S. C., pp. 444, 447. *The Alaska,* 113 U. S., 201.

The case of Crapo *v.* Kelly cited by counsel for defendant in error was one of priority of title. It was held that this would be regulated by the law of the port of registry. But that is entirely different from holding that the law of the port of registry is operative to create a new cause of action in a case of tort on the high seas.

In Rundell *vs.* Compagnie Generale, 100 Fed. 655 the Circuit Court of Appeals in the seventh circuit held that the law of the flag would not entitle the administrator of a person who was drowned in consequence of a collision, in which the "Bourgogne" sank, to bring an action in the courts of this country. It is true that the opinion of the Court in the Lindstrom case referred to in the brief for defendant in error was different, but this case can hardly be cited as an authority, because the libel there was dismissed on another ground.

It is however a well settled rule that this court will not review on a ground not presented below.

Klein *vs.* Russell, 19 Wall., 433.
Badger *vs* Ranlett, 106 U. S., 225.

It is needless therefore further to consider this question.

Twelfth.

The motion should be denied and the cause retained upon the docket.

EVERETT P. WHEELER,
Counsel for Plaintiff in Error.

FILE COPY.

FILED
DEC 12 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

Case No. 411.

THE HAMBURG-AMERICAN STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

against

MINNIE GRUBE, AS ADMINISTRATRIX, &C., DEFENDANT IN ERROR.

BRIEF AND ARGUMENT IN BEHALF OF DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

GILBERT D. LAMB,
Of Counsel for Defendant in Error,
253 Broadway, New York.

LIVINGSTON MIDDLEDITCH CO., 68 DUANE ST., N. Y.

In the Supreme Court of the United States,

OCTOBER TERM, 1904.

HAMBURG-AMERICAN STEAMSHIP COMPANY, Plaintiff in Error, vs. MINNIE GRUBE, as Administratrix of the Goods, Chattels and Credits of JOHN GRUBE, deceased, Defendant in Error.	No. 411.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM THE JUDGMENT OF THE COURT BELOW.

Now comes the said Minnie Grube, as Administratrix, etc., the defendant in error herein, by her counsel appearing on her behalf and moves the Court on the record herein:

FIRST.—To dismiss the writ of error herein for the want of jurisdiction in this Court.

SECOND.—To affirm the judgment of the New York Supreme Court, the review of which is sought by the writ of error herein, upon the ground that the rulings, decision

and judgment of the New York Supreme Court are obviously correct, and upon the further ground that it is manifest, the writ of error herein was taken for delay only, and the question upon which the jurisdiction depends is so frivolous as not to need further argument.

THIRD.—For interest and damages, as provided for by Rule 23 of this Court.

Respectfully submitted,

GILBERT D. LAMB,
of Counsel for the Defendant in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1904, No. 411.

HAMBURG-AMERICAN STEAMSHIP COMPANY,
Plaintiff in Error,

AGAINST

MINNIE GRUBE, as Administratrix, &c.,
Defendant in Error.

Notice of Motion to Dismiss.

SIR:

Please take notice that the Defendant in Error in the above entitled action will, on the 9th day of January, 1905, between the hours of 12 o'clock noon and 1 o'clock P. M., or as soon thereafter as counsel can be heard at the Supreme Court Room in the City of Washington, District of Columbia, in open Court, move this Court on the record herein:

FIRST.—To dismiss the writ of error herein for the want of jurisdiction in this Court.

SECOND.—To affirm the judgment of the New York Supreme Court, the review of which is sought by the writ of error herein, upon the ground that the rulings, decision and judgment of the New York Supreme Court are obviously correct, and upon the further ground that it is manifest that the writ of error herein was taken for delay only

and that the question upon which the jurisdiction depends is so frivolous as not to need any further argument.

THIRD.—For interest and damages as provided for by Rule 23 of this Court.

Together with this motion the Defendant in Error serves upon said Plaintiff in Error a *copy of his brief to* be filed in the Supreme Court in support of the said motion.

Dated, New York, December 3rd, 1904.

Very respectfully yours,

GILBERT D. LAMB,
Attorney and of Counsel for
Defendant in Error,
253 Broadway,
New York City.

To

EVERETT P. WHEELER, Esq.,
Attorney and of Counsel for
Plaintiff in Error,
21 State Street,
New York City.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904, No. 411.

HAMBURG-AMERICAN STEAMSHIP COMPANY, Plaintiff in Error, vs. MINNIE GRUBE, as Administratrix of JOHN GRUBE, deceased. Defendant in Error.	Motion to Dismiss Writ of Error to Supreme Court of New York also Motion to Affirm Judgment of Supreme Court.

SUGGESTIONS IN SUPPORT OF MOTION BY DEFENDANT IN ERROR.

1. To dismiss the writ of error for the want of jurisdiction in this Court to re-examine the final judgment of the Supreme Court of the State of New York, because the record presents no Federal question.

2. To affirm the judgment of the New York Supreme Court because the decision and rulings of the Court below in all issues that may possibly involve the color of a Federal question were obviously right.

STATEMENT OF FACTS.

John Grube, intestate of defendant in error, while on the *James Gordon Bennett*, a vessel owned by a New Jersey corporation, was drowned on August 17th, 1901,

by the sinking of that vessel by the steamship *Alene*, owned by plaintiff in error. This action was to recover damages for the death of such intestate under the Statute of the State of New Jersey providing therefor.

The place of the collision is not determined by this record—the witnesses for the plaintiff in error testifying that it occurred in waters beyond the three-mile limit of the coast of the State of New Jersey, and on the high seas —the witnesses for the defendant in error testifying that it occurred within the three mile limit along said coast. (fols. 60, 66, 79 and 100, 148, 40).

There is nothing in the record from which any judicial conclusion can be drawn on this point—the charge of the Court being omitted.

In the complaint it was claimed that the *James Gordon Bennett* belonged to a New Jersey corporation and this was not denied by the answer.

There was simply a general verdict for defendant in error, fixing the amount of the damages. No instructions to the jury were asked for by plaintiff in error and no exceptions taken to the charge.

Plaintiff in error only excepted to the Trial Court's refusal to direct a verdict in its favor discussed under Point III.

POINTS.

It is evident that the plaintiff in error invokes the jurisdiction of this Court to re-examine the final judgment of the Supreme Court of the State of New York by virtue of one or more of the provisions of the latter clause of Section 709 of the Revised Statutes.

I.

THIS COURT HAS NO JURISDICTION AND WILL ENTERTAIN NONE UNLESS IT AFFIRMATIVELY APPEARS IN THE RECORD THAT A FEDERAL QUESTION WAS, OF NECESSITY, PASSED UPON BY THE COURT BELOW, AND AGAINST THE CLAIM OF PLAINTIFF IN ERROR—ACTUALLY AND PROPERLY SET.

In the case of

Giles v. *Teasley*, 193 U. S. 146,

Mr. Justice Day said at p. 160:

"It must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the State Court could not have given judgment without deciding it." It is equally well settled that if the decision of a State Court rests on an independent ground—one which does not necessarily include a determination of the Federal right claimed or upon a ground broad enough to sustain it without deciding the Federal question raised, this Court has no jurisdiction to review the judgment of the State Court. *New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79; *Eustis* v. *Bolles*,

150 U. S. 361; *Dower* v. *Richards,* 151 U. S. 658, 666; *Wade* v. *Lawder,* 165 U. S. 624, 628."

And see

Col. Water Co. v. *Col. Elec. Co.* 172 U. S. 475, at p. 487.

In the case of

Eustis v. *Bolles,* 150 U. S. 361,

Mr. Justice Shiras said at p. 366:

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis,* 20 Wall, 590; *Cook County* v. *Calumet & Chicago Canal Co.,* 138 U. S. 635.

It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

* * * * * * * * * *

In *Johnson* v. *Risk,* 137 U. S. 300, the record showed that, in the Supreme Court of Tennessee, two grounds of defence had been urged, one of which involved the construction of the provisions of the Federal bankrupt act of March 2, 1867, and the other the bar of the statute of

limitation of the State of Tennessee; and this court held that "where, in an action pending in a state court, two grounds of defence are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the Federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defence which does not involve a Federal question is so palpably unfounded that it cannot be presumed to have been entertained by the State Court."

II.

UPON LEGAL PRINCIPLES, IT WAS UNNECESSARY FOR THE JURY OR COURT BELOW TO DETERMINE THE LOCALITY OF THE COLLISION HEREIN—WHETHER WITHIN OR WITHOUT THE THREE-MILE LIMIT—AND THERE IS NOTHING IN THE RECORD INDICATING THAT IT EVER WAS DETERMINED—ALL THE TESTIMONY IN REFERENCE THERETO BEING MATERIAL, UPON THE PRESENT RECORD, UPON THE LITIGATED QUESTION OF NEGLIGENCE. THIS BEING SO, THE RECORD DOES NOT DISCLOSE THAT ANY FEDERAL QUESTION WAS NECESSARILY PASSED UPON OR INVOLVED.

The record, (fol. 154), simply states that the verdict was in favor of defendant in error (plaintiff below) and the only thing necessarily determined thereby was that plaintiff in error (defendant below) was negligent and that such negligence caused the death of the intestate

and that the material facts, necessary to a recovery, alleged in the complaint, existed.

The allegations of the complaint, Paragraphs Seventh and Tenth, when read together, were that the tort, causing decedent's death, occurred in New Jersey or New York territory, in the vicinity of the high seas.

This allegation was sustained by proof that the vessel in question, which decedent occupied, was owned by a New Jersey corporation, as this made it New Jersey territory for the purposes of this action.

Whether the fact that the vessel itself was owned by a New Jersey corporation or that the waters on which the vessel rested, constituted the place which decedent occupied New Jersey territory, is immaterial.

(See cases below cited).

Proof of the allegation in the complaint that the collision actually occurred in New Jersey waters, while material and pertinent to various questions, including that of negligence, was not essential to a recovery, such recovery being justified, as indicated, by the fact that the vessel was owned by a New Jersey corporation.

Assuming the truth of the testimony of the plaintiff in error, as is possible and necessary upon the motion to direct a verdict, that the situs of the collision was outside of the three-mile limit, the only question upon this record apparently necessarily passed upon by the Court below was exclusively that of the application of common law principles and New Jersey statutes to a transaction between private parties on the high seas in a civil action.

Nothing in the record discloses that it is even pretended by plaintiff in error that such an action by the Supreme Court would present any Federal question.

Nothing in the assignments of error indicates any such supposed claim and there is no authority or basis of any sort for asserting it.

The law of the forum and of the Federal Court was that New Jersey law affected a New Jersey vessel on the high seas.

In the case of *Int. Nav. Co.* v. *Lindstorm,* adm., 123 F. R., 475, the action was by an administrator of a decedent under the New Jersey statute, to recover damages for death on a New Jersey vessel on the high seas.

Mr. Justice Wallace said:

"The territorial sovereignty of a State extends to a vessel of the State when it is upon the high seas, the vessel being deemed a part of the territory of the State, to which it belongs; and it follows that a State statute which creates a liability or authorizes a recovery for the consequences of a tortious act operates as efficiently upon a vessel of this State when the vessel is beyond its boundaries as it does when it is physically within the State."

See also to the same effect, the leading cases:

McDonald v. *Mallory,* 77 N. Y. 546.
Crapo v. *Kelly,* 16 Wall, 610.

If the New York Courts erred solely with respect to the application of State laws, this, of course is no ground for the intervention of Federal Courts—or for this writ of error.

III.

THE ACTION OF THE COURT BELOW UPON WHICH IS BASED THE CLAIM OF PLAINTIFF IN ERROR THAT FEDERAL QUESTIONS ARE PRESENTED FOR THE CONSIDERATION OF THIS COURT.

This is detailed at fols. 150-154, of the record and was simply a denial by the court below of a single motion by plaintiff in error to direct a verdict in favor of plaintiff in error as follows:

The defendant asked the Court to direct a verdict for the defendant, upon the following grounds:

(1) Defendant claims the right, under the statute of the United States confirming and approving the agreement as to boundaries between the State of New York and the State of New Jersey, to be free in navigating the main sea to the eastward of Sandy Hook Peninsula, from the operation of law of the State of New Jersey giving a right of action for injuries causing death, and claims that under the statutes aforesaid, the jurisdiction of that state extends only to the main sea; that is to say, low water mark along its exterior coast line and to a line drawn from headland to headland across the entrance to the Bay of New York. It, therefore asks the Court to direct the jury to return a verdict for the defendant on the ground that it appears by uncontradicted evidence that the collision between the SS. *Alene* and the schooner, *James Gordon Bennett,* to recover damages for which this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook Peninsula, and

at a distance of more than a mile to the eastward of low water mark upon the exterior line thereof.

(2) Defendant claims the right by reason of the purchase by the United States of the Sandy Hook Peninsula and the cession to the United States by the State of New Jersey of jurisdiction over the same and the long continued use of that peninsula, and of the main sea to the eastward of it for military purposes, to be free in navigating the main sea to the eastward of that peninsula from the operation of any law of the State of New Jersey, giving a right of action for injuries causing death, and claims that the main sea to the eastward of said peninsula to a distance of three miles from the shore is subject to the exclusive jurisdiction of the United States. It, therefore, asks the Court to direct the jury to return a verdict for the defendant, on the ground that it appears by uncontradicted evidence that the collision between the SS. *Alene* and the schooner *James Gordon Bennett,* to recover damages for which this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook peninsula, and at a distance of more than a mile to the eastward of low water mark, upon the exterior line thereof.

The Court denied the motion and defendant excepted."

A.

The grounds in above sub-division 1 as apparently claimed by plaintiff in error, are that the confirmation of two statutory state agreements by the Federal Statute divested the States of New Jersey and New York of certain rights over the adjoining sea theretofore belonging

to them and vested the exclusive legislative jurisdiction thereon in the Federal government and that therefore a verdict should have been directed.

(The apendix annexed hereto, contains the statutes referred to in full). A mere inspection of these statutes discloses not a word justifying any such claim as is asserted—absolutely nothing being said by either State as to abdicating any rights in favor of the United States, but merely fixing the boundaries of the said two States. Manifestly the claims in the above sub-division present no Federal question.

B.

The grounds in above, sub-division 2, as apparently claimed by plaintiff in error, are that the cession by the State of New Jersey to the United States of America of a certain strip of land at Sandy Hook vested in the United States exclusive legislative jurisdiction over the littoral waters extending three miles to the eastward of the coast line thereof, and that therefore a verdict should have been directed.

The plaintiff in error explicitly limited its claim to exclusive Federal jurisdiction over the adjoining waters to the three mile limit.

The record, however, discloses evidence that the collision in question occurred beyond the three-mile limit.

See record at fols. 100 and 148 in substance showing that the *Bennett* sank immediately upon the collision; that her hull was found at point marked "Wreck" Exhibit 2, and that this point was outside three-mile limit. (See stipulation, fols. 40 and 41).

A verdict in favor of plaintiff in error obviously

could not be directed on the grounds set up by plaintiff in error when its own evidence showed that the situs of the collision was outside the territory to which it limited its claim of Federal jurisdiction.

On the authorities above cited under Point II, defendant in error was quite as much entitled to recover for the collision outside the three-mile limit as if it occurred inside of it.

If plaintiff in error now asserts that it intended to claim exclusive Federal jurisdiction over high seas beyond three miles from the coast the claim is not supported by any authorities known to the writer and must be deemed frivolous.

IV.

IT WAS ALLEGED IN THE COMPLAINT, PARAGRAPH SIXTH, AND NOT DENIED BY THE ANSWER AND THEREFORE TO BE TAKEN AS TRUE THAT THE "JAMES GORDEN BENNETT" WAS A VESSEL OWNED BY A NEW JERSEY CORPORATION. AS SUCH, IT WAS SUBJECT WITH ITS OCCUPANTS, INCLUDING JOHN GRUBE, TO THE LEGISLATIVE JURISDICTION AND LAW OF THE STATE OF NEW JERSEY, WHILE ON THE HIGH SEAS, AND EVEN UPON THE TESTIMONY OF PLAINTIFF IN ERROR, ABOVE REFERRED TO AS TO THE SITUS OF THE COLLISION, THE VERDICT AS RENDERED, WAS RIGHT.

See cases above cited:

Int. Nav. Co. v. *Lindstorm*, 123 F. R. 475.
McDonald v. *Mallory*, 77 N. Y. 546.
Crapo v. *Kelly*, 16 Wall, 610.
Code of Civil Procedure (N. Y). §522.

V.

THE FORMAL ASSIGNMENTS OF ALLEGED ERROR BY PLAINTIFF IN ERROR.

These are seven in number and are printed at pp. 71-73 of the record.

So far as these embody grounds not affirmatively appearing in the record to have been specifically set up or claimed or involved in the decision, they must be disregarded pursuant to repeated decisions of this Court. In reality they are apparently intended to be merely amplifications of the portion of the record quoted under Point III.

A.

The "First," "Second," "Third," "Fourth" and "Fifth" grounds allege that the Supreme Court of the State of New York erred in "deciding" in a certain way and "denying" alleged rights and claims, but the record contains no basis for any such allegations except so far as involved in denying the motion of plaintiff in error to direct a verdict in its favor, above discussed under Point III, which motion, could not properly have been granted on the record owing to the fact that there was evidence that the situs of the collision was outside of the three-mile limit on the high seas.

These five assignments of error by plaintiff in error are mere assertions as to the action of the trial court without any support in the record.

The record shows that the trial court neither "decid-

ed'' in a certain way nor ''denied'' any rights or claims of plaintiff in error, except only it refused to direct a verdict—and properly,—because there was a dispute as to the locality of the collision and the record discloses no claim of plaintiff in error to be entitled to a verdict if the collision was beyond the three-mile limit (fols. 150-154).

If, as now asserted by plaintiff in error by the above assignments of error, it was the intention of plaintiff in error to claim that if the jury found that the collision occurred within the three-mile limit, there would be no liability, the proper and necessary course would obviously have been for plaintiff in error to ask the court below to so instruct the jury.

The record contains no affirmative evidence of such a request and, indeed, none was made.

The record does disclose that no exception was taken by plaintiff in error to the charge of the court, and this latter must be conclusively presumed by this court to have been right.

Non constat on this record but that the Trial Court did charge that plaintiff below was not entitled to recover if the jury found the collision occurred within the three-mile limit.

The ''Sixth'' assignment of error is the one in fact discussed under Point III and alleges error in denying the motion to direct a verdict and need be no further discussed.

C.

The ''Seventh'' assignment of error is merely an allegation that the judgment was erroneous and must be regarded as unavailing except as supported by the preceding assignments, and requires no separate discussion.

It is apparent from a mere inspection of the record at fols. 150-154, that none of the assignments of error are sustained by it.

These claims now made by plaintiff in error were never properly set up upon the trial, whether the collision is deemed to have occurred within or without the three-mile limit, and this Court, therefore, is without jurisdiction.

The trial Court could legally have made no different ruling on this record, even if this Court should be of opinion that the Federal government had exclusive legislative jurisdiction over the three-mile littoral off Sandy Hook.

VI.

THE CLAIM OF FEDERAL JURISDICTION, NOT BEING PROPERLY SET UP IN THE RECORD, THE WRIT OF ERROR SHOULD BE DISMISSED.

As above indicated, the proper course for plaintiff in error to have pursued, in order to raise the question, was to ask the trial Court to instruct the jury that if they found the collision to have occurred within the three-mile limit the verdict should be for defendant (below); plaintiff in error omitted to do this.

In the case of

Hamburg Am. S. S. Co., v. *Lenman*, 194 U. S. 629,

a case arising out of the collision involved in the case at bar—a motion to dismiss was granted because the claim of plaintiff in error was not properly set up.

The authorities there cited by this Court were as follows:

Staten Island Railway Company v. *Lambert*, 131 U. S. Appx. ccxi.
Weatherby v. *Bowie*, 131 U. S. Appx. ccxv.
Murdock v. *Memphis*, 20 Wall 590.
Egan v. *Hart*, 165 U. S. 188, 191.
Hannibal and St. Joseph Railway Company v. *Packet Company*, 125 U. S. 260; 272.
Eustis v. *Bolles*, 150 U. S. 361.
New Orleans Water Works Company v. *Louisiana*, 185 U. S. 336.

And see

Lennan v. *Hamburg American Steamship Company*, 73 App. Div. (N. Y.) 357.
The Alene, 116 Fed. Rep. 57.

VII.

Motion to Affirm.

The rights of the United States to Sandy Hook and its coast are derived from the act of the Legislature of the State of New Jersey, passed in the year 1846, (Laws of N. J. 1846, p. 124), quoted in appendix and its terms are such that even if a Federal question is involved it was clearly properly decided.

(The deeds conveying the legal title of the land in the record (fols. 106-137) are in the usual form of simple conveyances of real estate).

By the terms of the Act of the New Jersey Legislature, referred to, the United States acquired the land—nothing being said about the water—upon the condition that the cession "shall not prevent the operation of the

public laws of this state" (New Jersey) "within the bounds of said tract so far as the same may not be incompatible with the free use and enjoyment of the said premises by the United States for the purposes specified."

It has been decided by the Federal Courts that the jurisdiction of the United States extends only to low water mark on the New Jersey shore.

See

Middleton v. *La Campagni,* 100 F. R. 866.

The Middleton case is also an authority for the proposition that the acquisition of Sandy Hook by the United States was not an instance of a "purchase by the consent of the Legislature" of land by the United States authorized by §8 of Art. 1, of the Constitution of the United States.

See also

Fort Leavenworth v. *Lowe,* 114 U. S. 525.

Conclusion.

It is Respectfully Submitted for the Reasons Stated That This Motion to Dismiss or Affirm Should be Granted. The Defendant in Error, as the Record Discloses, is the Widow of the Intestate, Wholly Dependent Upon the Latter While He Lived for Her Support and Has Already Waited Between Three and Four Years for the Compensation Which has Been Awarded to Her.

Gilbert D. Lamb,
Counsel for Defendant in Error.

APPENDIX TO BRIEF OF DEFT. IN ERROR.

Statutes Involved or Cited.

Constitution of U. S. Art. 1 Sec. 8, p..... i
Laws of New Jersey, 1846, p..... ii
Act of Congress, app'd Mch. 26, 1804, p..... iii
Act of Congress, app'd June 28, 1834, p..... iv
Act of New Jersey, passed Feb'y. 26, 1834, p..... ix

EXTRACT FROM CONSTITUTION OF UNITED STATES.

ART. I. SEC. 8, (IN PART).

"The Congress shall have power * * * *To exercise exclusive Legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;* And

"To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

LAWS OF NEW JERSEY, 1846, PAGE 124.

An Act to vest in the United States of America jurisdiction over Sandy Hook.

1. Be it enacted by the Senate and General Assembly of the State of New Jersey: That the jurisdiction in and over all that portion of Sandy Hook, in the County of Monmout, owned by the United States, lying north of an east and west line through the mouth of Young's creek at low water, and extending across the island or cape of Sandy Hook from shore to shore, and bounded on all other sides by the sea and Sandy Hook bay, be and the same is hereby ceded to the United States, for military purposes; and the said United States shall retain such jurisdiction so long as the said tract shall be applied to the military or public purposes of said United States, and no longer.

2. And be it enacted: That the jurisdiction ceded in the first section of this act, shall not prevent the execution on the said tract of land of any process, civil or criminal, under the authority of this State, except so far forth as such process may affect any of the real or personal property of the United States of America within the said tract; nor shall it prevent the operation of the public laws of this State within the bounds of the said tract; so far as the same may not be incompatible with the free use and enjoyment of the said premises by the United States for the purpose above specified.

3. And be it enacted: That all the lands and tenements within the aforesaid boundaries, so long as the same shall continue the property of the United States, and to be used for the purpose expressed in this act, shall be and remain exempted from all taxes, assessments, and other charges which may be imposed under the authority of this State.

4: And be it enacted: That this act shall take effect immediately.

Approved March, 1846.

ACT OF CONGRESS, APPROVED MARCH 26, 1804.

United States Statutes at large, Vol. 2, p. 294.

Chap. XLIX.—An act to erect a lighthouse at the mouth of the Mississippi River, and also a lighthouse at or near the pitch of Cape Lookout, in the State of North Carolina; and a beacon at the north point of Sandy Hook.

SEC. 4. And be it further enacted: That it shall be the duty of the Secretary of the Treasury, as soon as the fee of the soil shall have vested in the United States, to cause a beacon to be erected on the north point of Sandy Hook, and the sum of two thousand dollars out of any unappropriated monies is hereby appropriated for that purpose.

Approved March 26, 1804.

ACT OF CONGRESS, APPROVED JUNE 28, 1834.

United States Statutes at large, Vol. 4, p. 708.

Chap. CXXVI.—An act giving the consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey, respecting the territorial limits and jurisdiction of said states.

WHEREAS, Commissioners duly appointed on the part of the State of New York, and commissioners duly appointed on the part of the State of New Jersey, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following, *viz:*

Agreement made and entered into by and between Benjamin F. Butler, Peter Augustus Jay and Henry Seymour, commissioners duly appointed on the part and behalf of the State of New York, in pursuance of an act of the legislature of the said State, entitled "An act concerning the territorial limits and jurisdiction of the State of New York and the State of New Jersey, passed January 18th, 1833, of the one part; and Theodore Frelinghuysen, James Parker and Lucius Q. C. Elmer, commissioners duly appointed on the part and behalf of the State of New Jersey, in pursuance of an act of the Legislature of the said State, entitled "An act for the settlement of the territorial limits and jurisdiction between the States of New Jersey and New York," passed February 6th, 1833, of the other part.

ARTICLE FIRST.—The boundary line between the two States of New York and New Jersey, from a point in the middle of Hudson River, opposite the point on the west shore thereof, in the forty-first degree of north latitude,

as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

ARTICLE SECOND.—The State of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that State.

ARTICLE THIRD.—The State of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; and of and over all the waters of Hudson River lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil creek; and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the State of New Jersey, that is to say:

1. The State of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson River which lies between Manhattan Island and New Jersey.

2. The State of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements made and to be made on the shore of the said State; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the State of New York, which now exist or which may hereafter be passed.

3. The State of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of

the middle of the said waters, Provided: That the navigation be not obstructed or hindered.

ARTICLE FOURTH.—The State of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island in respect to such quarantine laws and laws relating to passengers, as now exist or may hereafter be passed under the authority of that State and for executing the same; and the said State shall also have exclusive jurisdiction, for the like purposes of and over the waters of the Sound from the westernmost end of Shooter's Island to Woodbridge creek, as to all vessels bound to any port in the said State of New York.

ARTICLE FIFTH.—The State of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the Sound between Staten Island and New Jersey lying south of Woodbridge creek, and of and over all the waters of Raritan Bay lying westward of a line drawn from the lighthouse at Prince's Bay to the mouth of Mattavan creek; subject to the following rights of property and of jurisdiction of the State of New York, that is to say:

1. The State of New York shall have the exclusive right of property in and to the land under water lying between the middle of the said waters and Staten Island.

2. The State of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of Staten Island, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New Jersey, which now exist or which may hereafter be passed.

3. The State of New York shall have the exclusive

right of regulating the fisheries between the shore of Staten Island and the middle of the said waters; Provided: That the navigation of said waters be not obstructed or hindered.

ARTICLE SIXTH.—Criminal process, issued under the authority of the State of New Jersey, against any person accused of an offense committed within that State; or committed on board of any vessel being under the exclusive jurisdiction of that State as aforesaid; or committed against the regulations made or to be made by that State in relation to, the fisheries mentioned in the third article; and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof; may be served upon any of the said waters within the exclusive jurisdiction of the State of New York, unless such person or property shall be on board a vessel aground upon, or fastened to, the shore of the State of New York, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the State of New York.

ARTICLE SEVENTH.—Criminal process issued under the authority of the State of New York, against any person accused of an offence committed within that State, or committed on board of any vessel being under exclusive jurisdiction of that State as aforesaid, or committed against the regulations made or to be made by that State in relation to the fisheries mentioned in the fifth article; and also civil process issued under the authority of the State of New York against any person domiciled in tha' State, or against property taken out of that State, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the State of New Jersey, unless such person or property shall be on board a vessel aground upon or fastened to the shore of

the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

ARTICLE EIGHTH.—This agreement shall become binding on the two States when confirmed by the Legislatures thereof respectively, and when approved by the Congress of the United States.

Done in four parts (Two of which are retained by the Commissioners of New York, to be delivered to the governor of that State, and the other two of which are retained by the commissioners of New Jersey, to be delivered to the governor of that State) at the city of New York, this sixteenth day of September, in the year of our Lord one thousand eight hundred and thirty-three and of the independence of the United States the fifty-eighth.

B. F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR,
THEO. FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q. C. ELMER.

And whereas the said agreement has been confirmed by the Legislatures of the said States of New York and New Jersey, respectively,—therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress, assembled: That the consent of the Congress of the United States is hereby given to the said agreement, and to each and every part and article thereof, Provided: That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

Approved, June 28, 1834.

The statute of New Jersey passed February 26, 1834:

"An act to ratify and confirm an agreement made between the commissioners appointed by the governor of the State of New York and the commissioners appointed by the governor of the State of New Jersey, respecting the territorial limits and jurisdiction between the said States.

"WHEREAS, Commissioners duly appointed on the part of the State of New York and commissioners duly appointed on the part of New Jersey for the purpose of agreeing upon and settling jurisdiction and territorial limits of the two States have executed certain articles, two copies for each State, which are contained in the following words:

"AGREEMENT, made and entered into by and between Benjamin F. Butler, Peter Augustus Jay, and Henry Seymour, commissioners duly appointed on the part and behalf of the State of New York in pursuance of an act of the Legislature of the said State, entitled 'An act concerning the territorial limits and jurisdiction of the State of New York and the State of New Jersey,' passed January 18th, 1833, of the one part, and Theodore Frelinghuysen, James Parker and Lucius Q. C. Elmer, commissioners, duly appointed on the part and behalf of the State of New Jersey, in pursuance of an act of the Legislature of the said State entitled 'An act for the settlement of the territorial limits and jurisdiction between the States of New Jersey and New York,' passed February 6th, 1833, of the other part.

"ARTICLE 1.—The boundary line between the two States of New York and New Jersey, from a point in the middle of the Hudson River, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the bay of

New York, of the water between Staten Island and New Jersey, and of Raritan Bay, to the main sea, except as hereinafter otherwise particularly mentioned.

* * * * * * *

THEODORE FRELINGHUYSEN,
JAMES PARKER,
LUCIUS Q. C. ELMER,
B. F. BUTLER,
PETER AUGUSTUS JAY,
HENRY SEYMOUR.

Therefore,

"Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, That the aforesaid agreement, and every article, clause, matter and thing therein contained, shall be and the same is hereby fully and amply ratified and confirmed on the part of the State of New Jersey.

"Passed, February 26, 1834."

Supreme Court of the United States.

No. 411.—October Term, 1904.

The Hamburg American Steamship Company, Plaintiff in Error, *vs.* Minnie Grube, as Administratrix of John Grube, deceased.	In error to the Supreme Court of the State of New York.

[February 20, 1905.]

This action was brought in the Supreme Court of New York by Minnie Grube, as administratrix of John Grube, against the Hamburg American Steamship Company, to recover damages for his death, under the statute of New Jersey in that behalf, occasioned by the sinking of the James Gordon Bennett, a vessel owned by a New Jersey corporation, by the steamship Alene, belonging to the steamship company. There was a conflict of evidence as to the place of the collision, evidence being given on the one hand that it occurred in waters beyond the three-mile limit of the coast of the State of New Jersey, and, on the other, that it occurred within the three-mile limit along that coast.

The record discloses no instructions to the jury requested by defendant below, and no exceptions were taken by it to the charge of the court, which was not included in the bill of exceptions or case made.

Defendant moved the court to direct a verdict in its favor upon the following grounds:

"Defendant claims the right, under the statute of the United States confirming and approving the agreement as to boundaries between the State of New York and the State of New Jersey, to be free in navigating the main sea to the eastward of Sandy Hook peninsula, from the operation of any law of the State of New Jersey giving a right of action for injuries causing death, and claims that under the statutes aforesaid, the jurisdiction of that State extends only to the main sea; that is to say, low water mark along its exterior coast line and to a line drawn from headland to headland across the entrance to the bay of New York. It, therefore, asks the court to direct the jury to return a verdict for the defendant, on the ground that it appears by uncontradicted evidence that the collision between the SS. Alene and the schooner James Gordon Bennett, to recover damages for which this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook peninsula, and at a distance of more than a mile to the eastward of low water mark upon the exterior line thereof.

"Defendant claims the right, by reason of the purchase by the United States of the Sandy Hook peninsula, and the cession to the United States by the State of New Jersey of jurisdiction over the the same and the long continued use of that peninsula, and of the main sea to the eastward of it for military purposes, to be free in navigating the main sea to the eastward of that peninsula from the operation of any law of the State of New Jersey, giving a right of action for injuries causing death, and claims that the main sea to the eastward of said peninsula to a distance of three miles from the shore is subject to the exclusive jurisdiction of the United States. It, therefore, asks the court to direct the jury to return a verdict for the defendant on the ground that it appears by uncontradicted evidence that the collision between the SS. Alene and the schooner James Gordon Bennett, to recover damages for which this suit is brought, occurred upon the main sea and to the eastward of the Sandy Hook peninsula, and at a distance of more than a mile to the eastward of low water mark, upon the exterior line thereof."

The court denied the motion and defendant excepted. The jury found a general verdict for plaintiff below, and assessed the damages. Judgment was entered thereon, which was affirmed by the Appellate Division of the Supreme Court, and a writ of error from the Court of Appeals was denied. This writ of error was then allowed, and the case submitted on motions to dismiss or affirm.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The assertion by plaintiff in error that Federal questions were decided by the action of the courts below turns on the denial of the motion to direct a verdict on the two grounds above set forth.

As to the first ground, the contention is that the act of Congress of June 28, 1834, (4 Stat. 708, ch. cxxvi,) giving consent to the agreement or compact between the States of New Jersey and New York in respect of their territorial limits and jurisdiction, dated September 16, 1833, vested exclusive jurisdiction in the Federal Government over the sea adjoining the two States. But there is absolutely nothing in the agreement and confirmatory statutes abdicating rights in favor of the United States, and the transaction simply amounted to fixing the boundaries between the two States. Laws New York, 1834, p. 8, c. 8; Laws New Jersey, 1834, p. 118. The first proposition raised no Federal question.

As to the second ground, the contention is that the cession by New Jersey to the United States of jurisdiction over a certain strip of land at Sandy Hook vested in the United States exclusive legislative jurisdiction over the littoral waters extending three miles to the eastward of the coast line thereof.

Yet there was evidence introduced on behalf of defendant that the collision took place outside of that limit. And the trial court was not re-

quested to instruct the jury that if they found the collision to have occurred within that limit the verdict should be for the defendant.

The charge of the court is not before us, nor was any exception taken to any part of it, and the verdict and judgment must be held to have been rendered on the facts according to law. *Hamburg-Am. S. S. Co.* v. *Lennan*, 194 U. S. 629.

This being the situation we hesitate to retain jurisdiction. Nevertheless, as clause 17 of section 8 of article I of the Constitution* may be regarded as having been properly invoked by the second proposition, we feel justified in declining to sustain the motion to dismiss. And retaining jurisdiction, we think the judgment must be affirmed.

The jurisdiction of the United States over Sandy Hook is derived from the act of the legislature of New Jersey of March 12, 1846, set forth below.† (Laws N. J. 1846, p. 146.) In 1806 and 1817 deeds of the land included in Sandy Hook were given the United States, being simple conveyances of real estate for named money consideration.

The New Jersey act of 1846 was merely one of cession, and the operation of the general laws of New Jersey was reserved as therein provided. *Fort Leavenworth R. R. Company* v. *Lowe*, 114 U. S. 525; *Chicago & Pacific Railway Company* v. *McGlinn*, Id. 542.

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* "The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

† 1. "That the jurisdiction in and over all that portion of Sandy Hook, in the county of Monmouth, owned by the United States, lying north of an east and west line through the mouth of Young's Creek at low water, and extending across the island or cape of Sandy Hook from shore to shore, and bounded on all other sides by the sea and Sandy Hook Bay, be, and the same is hereby, ceded to the said United States for military purposes; and the said United States shall retain such jurisdiction so long as the said tract shall be applied to the military or public purposes of said United States, and no longer."

2. "That the jurisdiction ceded in the first section of this act shall not prevent the execution on the said tract of land of any process, civil or criminal, under the authority of this State, except so far forth as such process may affect any of the real or personal property of the United States of America within the said tract; nor shall it prevent the operation of the public laws of this State within the bounds of the said tract, so far as the same may not be incompatible with the free use and enjoyment of the said premises by the United States for the purposes above specified."

Moreover, as was held by the Circuit Court of Appeals for the Second Circuit, in *Middleton* v. *La Compagnie Générale Transatlantique*, 100 Fed. Rep. 866, the act did not purport to transfer jurisdiction over the littoral waters beyond low-water mark, and for the purposes of this case the public laws of New Jersey must be regarded as obtaining there, whether enacted prior or subsequent to the cession.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.